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Supreme Court, U.S.
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In The Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

RICHARD MYERS, AIR FORCE GENERAL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that petitioners' claim for religious abuse and humiliation at Guantánamo was not actionable under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, because they are not "persons"?

2. Whether the Court of Appeals erred in holding that petitioners lack the right under the Constitution not to be tortured or, alternatively, that respondents are entitled to qualified immunity because petitioners' right not to be tortured was not "clearly established" at the time of their detention?

3. Whether the Court of Appeals erred in holding that the ordering of torture by the Secretary of Defense and senior military officers was within the scope of their employment?

PARTIES TO THE PROCEEDING

1. Petitioners:

   Shafiq Rasul
   Asif Iqbal
   Rhuhel Ahmed
   Jamal Al-Harith

2. Respondents:

   Former Secretary of Defense Donald Rumsfeld
   Air Force General Richard Myers
   Army Major General Geoffrey Miller
   Army General James T. Hill
   Army Major General Michael E. Dunlavey
   Army Brigadier General Jay Hood
   Marine Brigadier General Michael Lehnert
   Army Colonel Nelson J. Cannon
   Army Colonel Terry Carrico
   Army Lieutenant Colonel William Cline
   Army Lieutenant Colonel Diane Beaver

3. Intervenors:

   None

4. Amici:

   The following Amici presented their views to the Court of Appeals:

   The National Institute of Military Justice, Brigadier General (Ret.) David M. Brahms,

Lieutenant Commander (Ret.) Eugene R. Fidell, Commander (Ret.) David Glazier, Elizabeth L. Hillman, Jonathan Lurie, and Diane Mazur.

Susan Benesch, Lenni B. Benson, Christopher L. Blakesley, Arturo J. Carlllo, Roger S. Clark, Marjorie Cohn, Rhonda Copelon, Angela B. Cornell, Constance de la Vega, Martin Flaherty, Hurst Hannum, Dina Haynes, Deena Hurwitz, Ian Johnstone, Daniel Kanstroom, Bert Lockwood, Beth Lyon, Jenny S. Martinez, Carlin Myer, Noah Benjamin Novogrodsky, Jamie O'Connell, Jordan J. Faust, Naomi Roht-Arriaza, Meg Satterthwaite, Ron Slye, Beth Van Schaack, David Weissbrodt, and Ellen Yaroshefsky, The Center for Justice and Accountability, Human Rights Watch, the Allard K. Lowenstein International Human Rights Clinic, and Physicians for Human Rights.

The Baptist Joint Committee for Religious Liberty, the National Association of Evangelicals, the National Council of Churches, the American Jewish Committee, the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), the General Conference of Seventh-Day Adventists, and the United States Conference of Catholic Bishops.

Charles Carpenter, Judith Brown Chomsky, George M. Clarke III, Jerry

Cohen, Joshua Colangelo-Bryan, George Daly, Jeffrey Davis, Josh Denbeaux, Mark Denbeaux, Stuart Eisenberg, Elizabeth P. Gilson, Candace Gorman, Eldon Greenberg, C. Clark Hodgson, Jr., Gaillard T. Hunt, Christopher Karagheuzoff, Ramzi Kassem, Samuel C. Kauffman, Ellen Lubell, Howard J. Manchel, Louis Marjon, Edwin S. Matthews, Brian J. Neff, Kit A. Pierson, Noah H. Rashkind, Martha Rayner, Marjorie M. Smith, Clive Stafford Smith, Mark S. Sullivan, Doris Tennant, Robert C. Weaver, Angela C. Vigil, Reprieve, CagePrisoners, and James Yee.

CORPORATE DISCLOSURE STATEMENT

There are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, and Jamal Al-Harith respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion below is reported as *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) (Appendix ("App.") 3a-66a).

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its opinion on January 11, 2008. Petitioners timely filed their Petition for Rehearing and Suggestion of Rehearing En Banc, which was denied on March 26, 2008. App. 146a, 148a. Petitioners' application to this Court to extend the time for filing a petition for writ of certiorari until August 22, 2008, was granted on June 2, 2008. App. 150a. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend V.

U.S. Const. amend. VIII.

Westfall Act, 28 U.S.C. § 2679(d).

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*.

Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc–5.

STATEMENT OF THE CASE

This petition raises issues at the core of ordered liberty: i) whether detainees imprisoned by the United States at the Guantánamo Bay Naval Station ("Guantánamo") have a protectible right to be free from abuse and humiliation in the practice of their religion; ii) whether these detainees have a clear, protectible right to be free from torture; and iii) whether ordering torture is within the scope of employment for senior government officials. The right to worship free from abuse and the right to be free from physical torture are enshrined in the Constitution, the Geneva Conventions and the Convention Against Torture, military law and U.S.

statutes.[1] These rights are also central to the concept of human dignity that underlies our constitutional system. Yet based upon its now-overruled holding that aliens at Guantánamo possess *no* constitutional rights, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd* ___U.S. ___, 128 S. Ct. 2229 (2008), the Court of Appeals held that these detainees are not "persons" entitled to protection of their right to worship under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), and are not entitled to be free from torture under the Fifth Amendment. The Court of Appeals' rulings are not only in conflict with this Court's precedents, but are contrary to the application of the rule of law at Guantánamo that this Court has repeatedly confirmed in *Rasul v. Bush* (*"Rasul I"*), 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, ___U.S.___, 128 S. Ct. 2229 (2008). While the right to challenge confinement affirmed in those cases is of critical importance, this case presents the opportunity to recognize and enforce rights that are at least as basic and essential to human autonomy – the right to worship and the right not to be tortured.

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[1] *See, e.g.*, Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 ("Convention Against Torture"); 18 U.S.C. § 2340, *et seq.*; 42 U.S.C. § 2000bb, *et seq.*; Army Reg. 190-8, Ch. 1-5(g).

The torture, abuse and religious humiliation of Muslim detainees at Guantánamo Bay stands as a shameful episode in our history. This petition enables the Court to remedy that stain on the moral authority of our nation and its laws, to overrule an obdurately insupportable exercise in statutory construction that effectively renders these petitioners, and all other detainees at Guantánamo, non-persons, and to facilitate accountability for these terrible acts. Five years ago, Shafiq Rasul petitioned this Court for the right to challenge his confinement through habeas corpus. *Rasul I*, 542 U.S. 466. Today, he seeks vindication of his statutory right to religious dignity and his right under the Constitution not to be tortured by United States government officials – universally recognized, irreducible minima that our legal system must provide to those under its control.

I. THE CLAIMS: RELIGIOUS ABUSE AND TORTURE AT GUANTÁNAMO

This case presents the question of whether senior officials of the United States Government can be held accountable pursuant to RFRA, the Constitution and customary international law for ordering the religious humiliation and torture of Guantánamo detainees. The complaint below was filed by four innocent British citizens who were detained at Guantánamo from January 2002 to March 2004, when they were released and flown home to England. App. 167a, 189a. Petitioners never took up arms against the United States, never received any military training, and have never been members of any terrorist group. App. 165a, 173a-

74a. They have never been charged with any crime. App. 167a. They were never determined to be enemy combatants. App. 167a.[2] Respondents are former Secretary of Defense Donald Rumsfeld and high-ranking military officers who ordered and supervised petitioners' incarceration and mistreatment at Guantánamo. App. 174a-79a.

Petitioners Rasul, Iqbal, and Ahmed are boyhood friends from the town of Tipton in England. App. 179a. At the time they were detained, they were 24, 20 and 19 respectively. App. 173a-74a. Iqbal had gone to Pakistan in September 2001 to get married. App. 180a. Ahmed joined him to be his best man. App. 180a. Rasul was in Pakistan studying computer science. App. 180a. All three went to Afghanistan to assist in providing relief for the humanitarian crisis that arose in 2001. App. 180a-81a. In Afghanistan they were captured by Afghan warlord Rashid Dostum, who is widely reported to have delivered prisoners to U.S. forces for the purpose of collecting a per capita bounty offered by the U.S. military. App. 165a. Dostum delivered Rasul, Iqbal, and Ahmed into U.S. custody in late 2001. App. 182a.

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[2] The complaint was dismissed on respondents' motion to dismiss. Accordingly, at this stage of the proceedings, all factual allegations of the complaint must be presumed to be true. *Bridge v. Phoenix Bond & Indem. Co.*, __ U.S. ___, 128 S. Ct. 2131, 2135 n.1 (2008)

Petitioner Al-Harith was also born and raised in England. App. 174a. He is a website designer in Manchester. App. 165a. In 2001, he traveled to Pakistan for a religious retreat. App. 165a-66a. When he was advised to leave the country because of growing animosity toward the British, he booked passage on a truck to Turkey, from which he planned to fly home to England. App. 166a. His truck was hijacked, and Al-Harith was forcibly brought to Afghanistan and turned over to the Taliban. App. 166a. He was accused of being a British spy, imprisoned in isolation, and beaten by his Taliban guards. After the Taliban fled in the wake of the U.S. invasion of Afghanistan, the British Embassy's plans to evacuate Al-Harith were preempted when U.S. forces arrived at the prison and took him into custody. App. 166a-67a.

All four petitioners were held and interrogated under appalling conditions in Afghanistan by the United States before they were transported to Guantánamo, where they were systematically tortured and abused pursuant to directives from respondent Rumsfeld and the military chain of command. App. 182a-89a. The complaint alleges that the treatment of petitioners violated clearly established legal and human rights, and that respondents were fully aware of this illegality, as would have been any reasonable person in respondents' positions. App. 212a-14a. For more than two years, petitioners were held arbitrarily and without charges at Guantánamo. While in detention, they were subjected to:

- repeated beatings (including with rifle butts, and beatings administered while petitioners were shackled and blindfolded);
- prolonged solitary confinement, including isolation in total darkness;
- deliberate exposure to extremes of heat and cold;
- threats of attack from unmuzzled dogs;
- forced nakedness;
- repeated body cavity searches;
- denial of food and water;
- deliberate disruption and deprivation of sleep;
- shackling in painful stress positions for extended periods;
- injection of unknown substances into their bodies; and
- deliberate interference with and denigration of their religious beliefs and practices, including the deliberate submersion of the Koran in a filthy toilet bucket.

App. 189a-207a.

Petitioners were deliberately prevented from fulfilling their daily obligation to pray, as prayers were frequently interrupted by shouts, taunts and the playing of earsplitting music over the camp public address system. App. 223a. The chaining of petitioners in the "short-shackling" position was not only extremely painful, but also prevented them from taking the required posture for prayer. App. 199a-200a. Forced nakedness violated the Muslim

tenet requiring modesty, particularly during prayer. App. 223a. Petitioners' beards were shaved forcibly, App. 187a, an infringement of Muslim religious practice. Desecration of the Koran was frequent and systematic, with numerous incidents of Korans being sprayed with high-power water hoses, splashed with urine and thrown in the toilet bucket. App. 223a-24a. These were calculated and illegal displays of disrespect toward the essential symbol of Islam.

The insulting of Muslims in their core beliefs was not the action of rogue guards on the night shift; it represented a clear and illegal policy choice by senior U.S. officials to exploit and denigrate detainees' Muslim beliefs and cultural practices. Department of Defense documents reveal that the Secretary of Defense himself ordered many of these practices personally.

Following their release, petitioners sued respondents for damages in the United States District Court for the District of Columbia. App. 161a-64a. The complaint asserted claims for torture, other mistreatment and abuse under, *inter alia*, the Fifth and Eighth Amendments to the Constitution, customary international law, the Geneva Conventions, and under RFRA based on respondents' deliberate interference with petitioners' exercise of their religion. App. 214a-25a.

II. THE TORTURE MEMOS

In the complaint, petitioners identified memoranda and reports generated, received and approved by respondents, which outlined, planned,

authorized and implemented the program of torture and abuse directed at petitioners and the other Guantánamo detainees.[3] For example, on December 2, 2002, respondent Rumsfeld approved a memorandum authorizing numerous illegal interrogation methods, including putting detainees in stress positions for up to four hours; forcing detainees to strip naked; intimidating detainees with unmuzzled dogs; interrogating them for 20 hours at a time; forcing them to wear hoods; shaving their heads and beards; incarcerating them in darkness and silence; exposing them to extremes of hot and cold; and using what was euphemistically called "mild, non-injurious physical contact." App. 171a-72a. Petitioners were subjected to all of these abusive practices – and more.

Thereafter respondent Rumsfeld commissioned a "Working Group Report" dated March 6, 2003, to address the legal consequences of authorizing these methods. App. 170a-71a.[4] That Report, entitled "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations," detailed the requirements of international and domestic law governing interrogations, including the Geneva Conventions, the Convention Against Torture, customary international law, and numerous sections of the U.S. criminal code. App. 170a-71a.

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[3] Since the filing of the complaint in 2004, numerous additional memoranda and reports have been made public further detailing respondents' direct role in petitioners' torture and abuse.

[4] A revised version of the Report was issued on April 4, 2003.

The Report acknowledged that the described interrogation techniques and conditions of imprisonment were illegal and sought to identify putative "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal *not* unlawful." App. 170a. The purpose of the Report, like the other memos prepared and approved by respondents, was to assist respondents in evading recognized legal prohibitions of their intended conduct. These documents can only be seen as a shameful nadir for American law, a cynical attempt to manipulate legal language to justify the inherently unjustifiable.

In sum, respondents ordered a program of torture, humiliation and abuse with a conscious and calculated awareness that these practices were illegal. Respondents' attempts to evade scrutiny of their conduct, and their after-the-fact contortions to create an Orwellian façade of legality, manifest their knowledge that they were acting illegally and in violation of clearly established legal rights.

III. DECISIONS OF THE DISTRICT COURT

In the district court, respondents moved to dismiss the complaint, asserting, *inter alia*, that plaintiffs had no protectible rights under the Constitution. Respondents further contended they were entitled to qualified immunity with respect to the constitutional and RFRA claims and absolute immunity under the Westfall Act, 28 U.S.C. § 2679(d)(1), for any violations of international law or treaty. App. 103a-04a. The district court dismissed

petitioners' constitutional claims based on qualified immunity. In contravention of *Saucier v. Katz*, 533 U.S. 194 (2001), the district court did not reach the question of whether detainees at Guantánamo have constitutional rights. App. 134a-36a. Rather, the district court held that, regardless of whether detainees have rights protected under the Constitution, such rights could not have been clearly established until this Court decided *Rasul I*. App. 142a. The district court further held, as a matter of law, that "torture is a foreseeable consequence of the military's detention of suspected enemy combatants," and, therefore, respondents were acting within the scope of their employment and were accordingly immune under the Westfall Act. App. 120a.

The district court denied respondents' motion to dismiss petitioners' RFRA claim, holding that the complaint did allege actionable conduct. App. 71a-72a. As the court observed, "flushing the Koran down the toilet and forcing [petitioners] to shave their beards falls comfortably within the conduct prohibited ... by RFRA." App. 93a-94a. The court further held that RFRA's applicability to U.S. military facilities and to U.S. civilian and military officers, including those serving at Guantánamo, was clear under the plain language of the statute and therefore well-established at the time that petitioners were abused. App. 95a-98a.

IV. DECISION OF THE COURT OF APPEALS

Respondents filed a timely notice of appeal of the district court's order denying dismissal on the basis of qualified immunity with respect to the RFRA claim. On petitioners' request, the district court certified its decision on the remaining issues pursuant to Fed. R. Civ. P. 54(b), allowing the petitioners to cross-appeal. App. 67a-69a.

Based on its now overruled opinion in *Boumediene*, 476 F.3d 981 (2007), the Court of Appeals held that petitioners had no right under the Constitution not to be tortured, noting that "Guantánamo detainees lack constitutional rights because they are aliens without property or presence in the United States." App. 36a. As in *Boumediene*, the Court of Appeals invoked its categorical reading of *Johnson v. Eisentrager,* 339 U.S. 763 (1950), and rejected the proposition that this Court's decision in *Rasul I* had distinguished *Eisentrager* in the context of Guantánamo. App. 38a-41a.[5] Finally, the Court of Appeals held in the alternative that, even if Guantánamo detainees had a constitutional right not to be tortured, that right was not clearly

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[5] The Court of Appeals' extensive and uncritical reliance on its own decision in *Boumediene* is all the more remarkable given that the instant case was argued, and the Court of Appeals' decision was rendered, long after this Court granted the petition for writ of certiorari in *Boumediene* and after the Court of Appeals withdrew its mandate in *Boumediene*, signaling the likelihood that the decision would be amended, overturned or withdrawn. Indeed, the Court of Appeals entirely ignored the fact that it had withdrawn its mandate in *Boumediene*. App. 41a.

established and therefore respondents were entitled to qualified immunity:

> The plaintiffs argue that a reasonable person would have been on notice that the defendants' alleged conduct was unconstitutional because the "prohibition on torture is universally accepted." The issue we must decide, however, is whether the rights the plaintiffs press *under the Fifth and Eighth Amendments* were clearly established at the time of the alleged violations.

App. 42a (internal citations omitted). Because the Court of Appeals held that such rights (which it did not recognize) were in any event not clearly established at the time petitioners were tortured, petitioners' claims were precluded by qualified immunity. App. 41a.

The Court of Appeals also held that the ordering of torture and abuse was foreseeable and incidental to respondents' duties as senior U.S. officers charged with interrogating detainees. App. 29a. The Court of Appeals rejected petitioners' arguments that: i) as a matter of law, torture could never be within the scope of employment of a U.S. officer; and, in the alternative, ii) whether seriously criminal conduct is within the scope of employment is an issue of fact on which petitioners were entitled to discovery and an evidentiary hearing. App. 29a-30a, 33a-34a.

Finally, the Court of Appeals reversed the district court's ruling that denied respondents'

motion to dismiss the RFRA claims, with the panel majority holding that petitioners "do not fall with[in] the definition of 'person,'" under RFRA, App. 54a, and therefore lacked standing to invoke RFRA's protections. App. 54a. The Court of Appeals did not apply ordinary principles of statutory construction to the term "person." Instead, it reasoned that RFRA was in essence a codification of constitutional free exercise principles, and therefore the word "person" should be imbued with a constitutional construction consistent with the Court of Appeals' reading of this Court's Fourth and Fifth Amendment jurisprudence, which, the Court of Appeals concluded, categorically excluded aliens at Guantánamo. App. 52a-54a.

Judge Brown wrote a separate concurrence criticizing the majority's failure to apply ordinary principles of statutory construction, and in particular its conclusion that Guantánamo detainees are not "persons."[6] Judge Brown then observed that the panel majority's ruling on the scope of RFRA left the Court of Appeals, "with the unfortunate and

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[6] Although Judge Brown correctly reasoned that the detainees cannot be excluded from the ambit of RFRA because they are "persons" under the statute, she nonetheless would have dismissed the petitioners' suit on grounds that the petitioners' claim under the Constitution, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), was precluded by "special factors," and that RFRA does not afford rights to persons such as the Guantánamo detainees, because Congress could not have intended such a result. App. 55a-58a. Judge Brown's limitation of the scope of *Bivens* actions is inconsistent with settled law, and her interpretation of RFRA finds no support in the text of RFRA or its legislative history and runs afoul of this Court's approach to statutory construction in *Rasul I*.

quite dubious distinction of being the only court to declare those held at Guantánamo are not 'person[s].' This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human." App. 65a.

REASONS FOR GRANTING THE PETITION

Approximately 800 men and boys have been incarcerated at Guantánamo since 2002. Today approximately 265 men remain at Guantánamo, nearly all of whom are devout Muslims, for whom daily prayer and other religious observances are an important part of life. App. 262a-65a. The Court of Appeals' decision that detainees are not "persons" and that RFRA does not apply at Guantánamo leaves these men unprotected from government officials' interference and harassment in their religious practices. This is the precise harm that RFRA was enacted to address. The inviolability of religious worship is at the core of the American ideal. Not only is it enshrined in the First Amendment, but, through RFRA, this principle has been strongly reinforced and extended by Congress. RFRA mandates a broad and unitary standard applicable to the entire federal government and its officers, requiring accommodation and respect for religious worship, and creates a specific cause of action to hold federal officials liable for its violation. For the Court of Appeals to interpret a statute guaranteeing religious freedom to *all* persons as protecting the religious dignity of only *some* persons, while permitting the systematic abuse of a discrete, insular group of Muslim men at Guantánamo, is

fundamentally in conflict with the precepts of religious freedom and dignity underlying our Republic, and inconsistent with the text and purpose of RFRA.

The Court of Appeals' sweeping conclusion that Guantánamo detainees have no constitutional rights and therefore can be tortured consistent with the Constitution is abhorrent in a nation of laws and is in direct conflict with this Court's precedents. The Court of Appeals' further conclusion that officers who were aware of the illegality of their conduct under numerous sources of law can nevertheless avoid liability for their actions through a calculated reliance on purported constitutional ambiguity is equally pernicious and contrary to this Court's long-standing doctrine that qualified immunity does not protect defendants who engage in deliberately unlawful conduct. Finally, the Court of Appeals' conclusion that torture and abuse are within the scope of employment and therefore respondents are immune from liability for their conduct is fundamentally at odds with the universal principle that torture is *ultra vires* under all circumstances.

Guantánamo continues to present numerous jurisprudential challenges to the judiciary. This case provides a critical opportunity for this Court to affirm strongly the guarantee to Guantánamo detainees of an irreducible minimum of human rights. It is essential for this Court to reverse the Court of Appeals' decision, which manifests indifference to religious abuse and torture and flouts the Guantánamo jurisprudence carefully developed and expounded by this Court.

I. THE COURT OF APPEALS' DECISION THAT PETITIONERS ARE NOT "PERSONS" IS DIRECTLY CONTRARY TO THIS COURT'S CONSTITUTIONAL AND STATUTORY JURISPRUDENCE.

RFRA provides a cause of action to any "person" whose religious exercise has been substantially burdened by the government. App. 157a (42 U.S.C. § 2000bb-1(c)). It precludes the federal government or any of its officers from infringing on a person's exercise of religion, unless the restriction is the "least restrictive means of furthering [a] compelling governmental interest." App. 157a (42 U.S.C. § 2000bb-1(b)(2)). An "exercise of religion" means "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." App. 158a, 160a (42 U.S.C. § 2000bb-2(4); 42 U.S.C. § 2000cc-5(7)(A)). As the district court recognized, RFRA on its face provides a cause of action for petitioners in the circumstances presented here. The complaint alleged that respondents deliberately infringed on petitioners' religious exercise by, *inter alia*, interfering with their prayer, shaving their beards, forcing nudity and desecrating their Korans. App. 187a-88a, 206a, 223a.

The Court of Appeals rejected this straightforward application of RFRA. Instead, it held that, because Guantánamo detainees have no constitutional rights (a blanket proposition rejected by this Court in *Boumediene*, 128 S. Ct. 2229), they

also have no rights under RFRA. This approach to statutory interpretation is in direct conflict with this Court's decision in *Rasul I*, which squarely held that a statute is *not* limited by the scope of analogous constitutional provisions, but must instead be construed and given effect according to its own terms. As the Court expressly held with respect to the application of the federal habeas statute to detention of these petitioners:

> Considering that [§ 2241] draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

Rasul I, 542 U.S. at 481 (footnote omitted). No less so here. RFRA, like the habeas statute, draws no distinction between citizens and aliens, and nothing in RFRA suggests any variance in its geographical reach based on a plaintiff's citizenship.

By its express terms, RFRA protects all "persons" from government interference with their exercise of religion. As Judge Brown noted in her concurrence, the majority's construction of the term "persons" to exclude petitioners contradicts the "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." App. 59a. Where an unambiguous word is undefined in a statute, it must be construed "in

accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). Given its "ordinary or natural meaning," "person" is a broad term that encompasses human beings regardless of their place of residence or citizenship. *Cf. Rasul I*, 542 U.S. at 480 (where statute draws no distinction between aliens and citizens, courts should not imply one). Where Congress intends to limit the term "person" by citizenship or residence, it knows how to do so. Indeed, Congress has done so clearly in other broad remedial contexts. For example, in Sections 1981 and 1983, Congress limited the class of "persons" who may state claims to persons "within the jurisdiction" of the United States. 42 U.S.C. §§ 1981, 1983. No such limitation exists in RFRA.

This Court has expressly instructed that exceptions are not to be judicially implied into a statute unless the absence of the exception would lead to an absurd result. *United States v. Rutherford*, 442 U.S. 544, 555 (1979) ("Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied."). The Court of Appeals ignores this instruction and, as it did in *Rasul I*, fashions its own Guantánamo exception to a statute that includes no such condition or qualification.

The Court of Appeals' ruling conflicts as well with this Court's construction of the scope of RFRA. As this Court observed in *City of Boerne v. Flores*, 521 U.S. 507 (1997), RFRA's "restrictions apply to

every agency and official .... [and] to all federal and state law, statutory or otherwise." *Id.* at 532. Contrary to the Court of Appeals' conclusion, RFRA was not enacted merely to be co-extensive with the First Amendment, which would have been duplicative and rendered the statute a nullity. Rather, it was enacted to supplement the First Amendment by extending protection to religious practices that this Court had expressly held were *not* protected by the First Amendment. App. 155a-56a (42 U.S.C. § 2000bb); *see* S. Rep. 103-111, at 4, *as reprinted in* 1993 U.S.C.C.A.N. at 1893. Prior to the passage of RFRA, this Court had held that the First Amendment did not protect the religious practice of using illegal drugs against the effect of a law of neutral application, *Employment Div. v. Smith*, 494 U.S. 872 (1990), that it did not protect the rights of military officers to wear yarmulkes while in uniform, *Goldman v. Weinberger*, 475 U.S. 503 (1986), and that it did not protect the rights of Muslim prisoners to attend Friday services, *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). With its deliberately broad and unconditional language, RFRA protects these (and many other) practices. It applies in prisons; it applies to the military; it applies to all government officers wherever situated; it applies to all territories and possessions of the United States. Far from simply duplicating constitutional protections, RFRA expressly supplements and extends protection to religious practices that may not be covered by the Constitution. This construction of RFRA has been adopted by the United States, which has urged it in this Court. *See* Brief of the United States as Amicus Curiae, *City of Boerne v. Flores*, 1997 U.S. S. Ct. Briefs LEXIS 185

at *70-71 & n.40 (Jan. 10, 1997) (citing cases). And the language of the statute iterates an even broader purpose, "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." App. 157a (42 U.S.C. § 2000bb(b)(2)). The Court of Appeals' conclusion that RFRA "did not expand the scope of the exercise of religion beyond that encompassed by the First Amendment," App. 49a, is thus demonstrably incorrect and entirely at odds with the purpose, effect and express language of RFRA.

Having wrongly concluded that RFRA merely codifies the Constitution, the Court of Appeals then compounded its error by limiting RFRA's meaning based on its incorrect (and now overruled) construction of Fourth and Fifth Amendment jurisprudence. Based on its decision in *Boumediene,* the Court of Appeals held that, because nonresident aliens are not "persons" under the Fourth or Fifth Amendments, they have no *statutory* rights under RFRA. App. 54a. As this Court stated in *Rasul I,* and reaffirmed in *Boumediene*, the Court of Appeals was plainly wrong in holding categorically that Guantánamo detainees have no enforceable statutory or constitutional rights. With respect to constitutional rights, this Court in *Boumediene* followed the analysis of the *Insular Cases*, *e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dorr v. United States*, 195 U.S. 138 (1904), and their progeny, concluding that the applicability of a constitutional provision outside the sovereign territory of the United States "depends upon the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it

and, in particular, whether judicial enforcement of the provision would be impracticable and anomalous." *Boumediene,* 128 S. Ct. at 2255 (internal quotations omitted). This Court reaffirmed its prior finding that Guantánamo "is under the complete and total control of our Government" and, accordingly, the constitutional right to habeas corpus applies there. *Id.* at 2262. Although a statutory right is at issue here, because the Court of Appeals based its holding on constitutional construction, it is important to note that the Court of Appeals' categorical denial of constitutional rights to aliens at Guantánamo has been definitively overruled. Thus, even under the Court of Appeals' incorrect bootstrapping of constitutional reasoning into RFRA, its analysis would fail because under the Court's reasoning in *Boumediene,* the right to be free from official religious abuse at Guantánamo would certainly not be "impracticable and anomalous." *Id.* at 2255.

Certiorari is warranted here not simply because a lower court fundamentally misconstrued a statute, even an important statute like RFRA. Rather the Court of Appeals has once again, directly and obdurately in conflict with this Court's jurisprudence, rejected the proposition that detainees have even the most basic of rights and that government action at Guantánamo is constrained by law and the Constitution. Since detentions at Guantánamo commenced in 2002, the Court of Appeals has been faced with numerous cases asserting rights on behalf of detainees. In each instance, the Court of Appeals has held that detainees do not possess the right being asserted.

E.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). On certiorari, this Court has reversed each of these decisions and affirmed that the detainees possess cognizable rights under the laws of the United States and under the Constitution. *Rasul I*, 542 U.S. at 466; *Hamdan*, 548 U.S. at 625-26; *Boumediene*, 128 S. Ct. at 2262. Nevertheless, despite this Court's guidance, the Court of Appeals ignored both the principles of statutory construction that should have resolved this case in petitioners' favor and the clear line of this Court's jurisprudence rejecting the Court of Appeals' blanket repudiation of detainee rights. Petitioners respectfully submit that an unequivocal affirmation of the gravamen of this Court's Guantánamo holdings to provide definitive guidance to the lower courts – particularly regarding torture and religious abuse – is another critical reason for the Court to grant review in this case.

II. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT DETAINEES IN U.S. CUSTODY AT GUANTÁNAMO CANNOT BE TORTURED AND THAT OFFICIALS WHO DO SO ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Whatever euphemisms are applied, whatever abstractions are invoked, petitioners were deliberately tortured at the behest and direction of the former Secretary of Defense and senior officers in the chain of command. The torture and abuse were not the acts of a rogue guard or interrogator

but, as has now been made public, were part of a specific plan memorialized through written instructions. Respondents conceived and implemented their program of torture and abuse in violation of the express policy statements of the President, applicable military regulations, the Constitution, U.S. and international law, and any pretense of honor or decency. Not only should respondents (or any reasonable officers serving in respondents' positions) have known of the illegality of their conduct, the complaint is replete with allegations that respondents in fact *did know*. They requested, wrote and received memorandum after memorandum, all detailing the various ways in which their conduct and orders were violations of applicable law. App. 72a. It was for this very reason that each report or memorandum tried also to concoct a *post hoc* legal justification for respondents' unconstitutional and illegal acts. In holding that petitioners had no rights, the Court of Appeals appeared to accept that the Constitution does not prevent official torture and abuse of detainees at Guantánamo, but in any event the right not to be tortured was not clearly established when petitioners were detained. This Court should make clear that officials cannot take refuge in constitutional ignorance or ambiguity when they are attempting to circumvent rather than comply with the law.

Respondents argued below that they are entitled to qualified immunity because, whatever the illegality of their conduct under U.S. criminal statutes, the Uniform Code of Military Justice, and U.S. treaty obligations, the law was unclear whether detainees were entitled to constitutional protections,

and thus petitioners' *constitutional* right not to be tortured and abused was not clearly established at the time of their detention. Both the district court and the Court of Appeals accepted this argument and dismissed petitioners' constitutional claims on the basis of respondents' qualified immunity.[7] Indeed, the Court of Appeals held that petitioners have no constitutional protection from torture in any event.

The Court should grant review of these holdings because i) it should not let stand the Court of Appeals' conclusion that Guantánamo detainees can be tortured and abused; and ii) they are in conflict with this Court's decision in *United States v. Lanier*, 520 U.S. 259, 271 (1997), and this case presents an opportunity for the Court to make clear the applicability of *Lanier*, which was decided in the criminal due process context, to cases in which qualified immunity is directly at issue.

In *Boumediene*, 128 S. Ct. 2229, this Court definitively rejected the Court of Appeals' conclusions that the Constitution does not apply at Guantánamo and that detainees have no rights

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[7] This Court has previously held in the *Bivens* context that a government official is not entitled to qualified immunity if he or she has violated "clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citation and quotation omitted). The test for qualified immunity is one of "objective legal reasonableness." *Harlow*, 457 U.S. at 819.

under the Constitution. To the contrary, the Court held not only that the Suspension Clause of the Constitution applies at Guantánamo, but also that, like the rights guaranteed under the Suspension Clause, "the substantive guarantees of the Fifth and Fourteenth Amendments" apply to foreign nationals, like petitioners, "who have the privilege of litigating in our courts." 128 S. Ct. at 2246. Following its decision in *Boumediene*, the Court should grant review in the instant case to make crystal clear that a fundamental right guaranteed by the Fifth and Fourteenth Amendments – the right not to be tortured while in custody – also applies at Guantánamo. It is critical that this Court not let stand the Court of Appeals' contrary ruling – that respondents' conduct at Guantánamo was unconstrained by the Constitution and, accordingly, they were free to torture and abuse petitioners without risk of personal liability.

This Court held in *Lanier* that, regardless of whether the constitutional parameters of a particular right have been established clearly by previous case law, qualified immunity is not available if the illegality of the conduct would be obvious to any reasonable person, even if there were no case law directly on point establishing that the Constitution applied to the conduct. *Lanier*, 520 U.S. at 271. *Lanier* addressed a criminal defendant's substantive due process defense that he had insufficient notice that his crime constituted a constitutional violation that could be prosecuted under 18 U.S.C. § 242. Although the Court relied on the qualified immunity standard in holding that the defendant in *Lanier* had sufficient notice of the

unconstitutionality of his conduct, it has not yet considered the holding of *Lanier* in the context of a claim of qualified immunity for seriously illegal conduct. This case presents this Court with the opportunity to confirm what *Lanier* rightly suggests – that officials who deliberately violate law that they know (and any reasonable official would know) prohibits their conduct cannot claim qualified immunity on the basis that they were unaware that the conduct rises to a constitutional violation or that a court had yet to rule precisely on the issue.

A. Any Reasonable Officer Would Know that Torture and Deliberate Abuse Are Illegal Under All Sources of Law.

It is remarkable that in 2008 it can be seriously contended that the Constitution does not prohibit official torture of persons in custody. The principle that government officials cannot torture prisoners is not new. As long ago as 1936, this Court considered whether the right not to be tortured was "fundamental" for the purpose of imposing it on the States under the Due Process Clause of the Fourteenth Amendment. *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case, the Court held that torture is inconsistent with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 286. Thus, the right not to be tortured was protected by the Fourteenth Amendment, and torture was banned as state as well as federal practice.

Torture is "universally condemned" under international law as well. *Sosa v. Alvarez Machain*,

542 U.S. 692, 762 (2004) (Breyer, J., concurring). U.S. courts have recognized for more than twenty-five years that no sovereign has the authority to order torture. In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), cited with approval by this Court in *Sosa*, 542 U.S. at 738 n.29, the Second Circuit held that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." *Filartiga*, 630 F.2d at 881. "[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind." *Id.* at 890. The United States is a signatory to the Convention Against Torture. 2 U.S. Dep't of State, Treaties in Force at 182 (2007), *available at* http://www.state.gov/documents/organization/89668.pdf. The United States Government has repeatedly, officially and publicly condemned torture in any and all circumstances and acknowledged that:

- the prohibition on torture applies to the U.S. military;
- torture "cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer"; and
- "a commanding officer who orders such punishment would be acting outside the scope of his or her position and would be individually liable for the intentional infliction of bodily and emotional harm."

App. 228a, 231a. The United States Government could not have been more clear in articulating the scope and nature of its obligations:

> The United States is unequivocally opposed to the use and practice of torture. No circumstances whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for *or defense to committing torture*. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government. All components of the United States Government are obliged to act in compliance with the law, including all United States *constitutional*, statutory and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate or condone torture, or other unlawful practices by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States *and in other parts of the world*.

App. 237a-38a (emphasis added).

The prohibition against torture is not only deeply embedded as a matter of policy and customary international law, it is a bedrock norm of constitutional law. As the Court noted in *Brown*, torture "offends some principle of justice so rooted in

the traditions and conscience of our people as to be ranked as fundamental." 297 U.S. at 285. From the *Insular Cases* to *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J. concurring), to *Rasul I*, to *Boumediene*, this Court has adopted a functional analysis of what rights may be applied to aliens and citizens outside the United States. That analysis is premised on the concept that "fundamental" rights apply where they can practicably be enforced. And as *Brown* teaches, few if any rights are more "fundamental" than the right of a prisoner not to be tortured. As Justice Scalia recognized in dissent in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a case decided the year before petitioners were sent to Guantánamo, this norm is so obvious that, even in the case of aliens who may be entitled to only minimal constitutional protection, it is certain that "they cannot be tortured." *Id.* at 704 (Scalia, J. dissenting). In sum, it has been long established that there is an irreducible constitutional minimum that government officials owe to human beings under their control – whether citizens or aliens – and that minimum necessarily includes the prohibition of torture.

B. The Court Should Make Clear that Officials who Order Torture Are Not Entitled to Qualified Immunity.

Respondents knew, as any civilized person would know, that torture and deliberate abuse are wrong and violate fundamental rights wherever they occur. They brought detainees to Guantánamo rather than to a detention facility in the U.S. in a calculated attempt to circumvent the constitutional

provisions that forbid torture. Their memos evidence, however, that they were aware that other sources of law forbidding torture, including U.S. criminal law and the Uniform Code of Military Justice, expressly prohibited torture and did apply at Guantánamo. App. 170a-71a. Defendants' gamble that Guantánamo might be recognized as a haven for torture – where torture was concededly illegal, but possibly not unconstitutional – is not the kind of conduct that the doctrine of qualified immunity is intended to protect.

The Court of Appeals relied on the absence of any constitutional ruling directly on point that prohibits torture and deliberate abuse at Guantánamo. But this Court has made clear that the lack of a directly applicable precedent does not insulate egregious conduct. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court unambiguously rejected the proposition that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." 483 U.S. at 640. For a right to be clearly established, it is enough that "the contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right. ... [I]n light of pre-existing law, the unlawfulness must be apparent." *Id.* There can be no doubt that the unlawfulness of torture and abuse was clear to the Secretary of Defense and senior military officers.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), prison guards shackled prisoners to a hitching post on a hot day, conduct very similar to the "short-shackling" of

petitioners. App. 199a. The guards defended the claims against them on the ground that there had been no decision establishing that the Constitution prohibited the practice. The Court held that the "obvious cruelty inherent" in the use of the hitching post and treatment "antithetical to human dignity" under circumstances that were both "degrading and dangerous" were sufficient to put the guards on notice of the constitutional violation. *Id.* at 745-46. In addition, in *Hope*, the Court noted that defendants knowingly violated their own regulations, which put defendants on notice and precluded their reliance on qualified immunity. The fact that the specific practice had never been addressed by the courts did not afford the defendants in *Hope* an escape into qualified immunity. That respondents here were senior government officials rather than prison guards in no way changes the analysis.

Similarly, in *United States v. Lanier*, 520 U.S. 259 (1997), a state court judge was charged with criminal constitutional violations pursuant to 18 U.S.C. § 242. Lanier argued that he was not on notice that the Constitution was implicated in his criminal conduct – sexual assault of five women who worked in the courthouse – even though he was aware that state criminal statutes prohibited such behavior. In essence, his position was that although he knew his conduct was wrongful, and even illegal, he could not have known it was unconstitutional because there was no precedent on point. This Court summarily rejected Lanier's defense because the illegality of his conduct, if not its unconstitutionality, was obvious. Analogizing Lanier's due process

defense to an assertion of qualified immunity, the Court stated, "the easiest cases don't even arise. There has never been a ... section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." 520 U.S. at 271 (internal citations omitted). The teaching of *Lanier* is clear: the torturer, like the hypothetical child slaver, cannot rely on the absence of a case on point.

Like the defendant in *Lanier*, the Court of Appeals approached the question of qualified immunity with a single, narrow question – was there a case holding torture at Guantánamo violated specific provisions of the Constitution? Because the court answered this question in the negative, it held that respondents could not be held liable, regardless of the illegality of their conduct under other applicable laws. This is precisely the approach that the Court rejected in evaluating Lanier's substantive due process defense. If the Court of Appeals had applied the standard enunciated in *Lanier*, which would have required it to accept that, irrespective of a constitutional precedent on point, any reasonable officer would know that torture was prohibited by every other source of law, it would have rejected respondents' qualified immunity defense.

While the standard is an objective one, good faith remains at the heart of qualified immunity; indeed, the terms qualified immunity and "good faith immunity" are often used interchangeably. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Such immunity is not intended to protect defendants who

engage in deliberately unlawful conduct. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Respondents knew, as the prison guards knew in *Hope*, that they were violating their own regulations. Moreover, as in *Hope*, the "obvious cruelty inherent" in torture put respondents on notice of their violations of law. They knew, as any reasonable officer would, that torture violated U.S. criminal and military law. They knew, as any reasonable officer would, that torture in a prison setting was unconstitutional. *Brown*, 297 U.S. at 285-86. They knew that even those who believe that aliens in detention have few or no constitutional rights know that aliens surely "cannot be tortured." *Zadvydas*, 533 U.S. at 704 (Scalia, J. dissenting). Nevertheless, respondents ordered and supervised the torture and abuse of petitioners and numerous others at Guantánamo. Respondents' calculated legalistic machinations aimed at circumventing the laws prohibiting their conduct make them more rather than less culpable than the casually cruel prison guards in *Hope*.

As the Court made clear in *Lanier*, officials are not free to act in a deliberately wrongful manner so long as there is no constitutional precedent specifically addressing and prohibiting their conduct. *Lanier*, 529 U.S. at 271. "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819. Yet a license for lawless conduct – a license to torture, abuse and humiliate – is precisely what respondents sought at Guantánamo. In granting review, this Court has the opportunity to revoke that "license," extending a minimum

guarantee of dignity and decency to the hundreds who remain in detention at Guantánamo.

Respondents selected Guantánamo as plaintiffs' detention facility in a cynical attempt to avoid accountability for conduct that had long been held unconstitutional when it occurred in U.S. prisons. But Guantánamo is not a Hobbesian enclave where defendants could violate clear prohibitions on their conduct imposed by statute and regulations and then point to a purported constitutional void as a basis for immunity. It is of critical importance that this Court strongly affirm that torture is unequivocally beyond the pale for officials of the United States, wherever they may be operating.

III. THIS COURT SHOULD MAKE CLEAR THAT TORTURE CAN NEVER BE WITHIN THE SCOPE OF AN OFFICIAL'S EMPLOYMENT.

This case further presents an important opportunity to draw a clear line between the permissible functions of a U.S. government official in conducting interrogations of detainees in custody and the use of torture. The district court and the Court of Appeals erased that line, holding that torture was "foreseeable," App. 29a, 124a, and "incidental to the defendants' legitimate employment duties." App 26a. The courts held that respondents were therefore immune from personal liability under the Westfall Act, 28 U.S.C. § 2679(d)(1). This Court has recognized that torture violates the most basic norms of civilized conduct and law. *Brown*, 297 U.S.

at 285-86. Yet the decisions below finding torture and abuse to be "incidental" to the task of interrogation can only be construed as acceptance of the repellent proposition that torture is expectable in the context of authorized interrogation and that senior U.S. military officials who order it should be immunized. Torture is not incidental to military operations; it is directly contrary to military law, training and tradition. Left in place, the Court of Appeals' holding cloaks the torturer with absolute immunity under the Westfall Act.

Numerous cases involving foreign dictators, officials and military officers have made clear that torture can never be authorized as an official act. *See Nuru v. Gonzalez*, 404 F.3d 1207 1222-23 (9th Cir. 2005); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Filartiga*, 630 F.2d 876; *Khouzam v. Hogan*, 529 F. Supp. 2d 543 (M.D. Pa. 2008); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995). It is also so repugnant to all civilized norms that it can never be deemed incidental to a public official's duties. Nor can it be seen as foreseeable or expectable that the Secretary of Defense and senior officers of the military would deliberately order and supervise torture and abuse. Military law since the founding of the Republic has made clear that prisoners are *not* to be tortured. Torture is never incidental to proper military interrogation; it cannot be authorized. App. 208a-09a, 228a. The U.S. State Department has made clear that torture is always condemned, always unauthorized and that "a commanding officer who orders [torture] *would be acting outside the scope of his or her position* and would be individually

liable for the intentional infliction of bodily and emotional harm." App. 231a (emphasis added).

The Court of Appeals' decision creates a conflict between extensive jurisprudence in numerous Courts of Appeals establishing that foreign officials can never authorize torture and this case, which immunizes American officials who order torture in the course of interrogation. Not only is there uncertainty about whether officials can order torture, there is hypocrisy as well, where foreign torture is piously condemned and foreign commanders and officials are held accountable in the U.S. courts, but American officials claim complete immunity. The Court should grant review in the instant case to confirm that American officials, as well as foreign officials, will be held accountable when they cynically violate the universal prohibition against torture.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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August 22, 2008

APPENDIX A - ENTERED January 11, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5209 **September Term, 2007**

SHAFIQ RASUL, ET AL.,
APPELLANTS/CROSS-APPELLEES

v.

RICHARD MYERS,
AIR FORCE GENERAL, ET AL.,
APPELLEES/CROSS-APPELLANTS

Consolidated with 06-5222

Appeals from the United States District Court
for the District of Columbia
(No. 04cv01864)

Before: HENDERSON, RANDOLPH and BROWN, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby affirmed in part and reversed in part, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By /s/_____
Michael C. McGrail
Deputy Clerk

Date: January 11, 2008

Opinion for the court filed by Circuit Judge Henderson.
Concurring opinion filed by Circuit Judge Brown.

APPENDIX B - ENTERED January 11, 2008

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2007
Decided January 11, 2008

No. 06-5209

SHAFIQ RASUL *ET AL.*,
APPELLANTS/CROSS-APPELLEES

v.

RICHARD MYERS, AIR FORCE GENERAL ET AL.,
APPELLEES/CROSS-APPELLANTS

Consolidated with
06-5222

Appeals from the United States District Court
for the District of Columbia
(No. 04cv01864)

Eric L. Lewis argued the cause for the appellants/cross-appellees. *A. Katherine Toomey*, *Sarah L. Knapp*, *Elizabeth A. Wilson*, *Michael Ratner*, *Jennifer M. Green* and *Shayana Kadidal* were on brief.

Sidney S. Rosdeitcher was on brief for *amici curiae* National Institute of Military Justice et al. in support of the appellants.

William J. Aceves and *Paul Hoffman* were on brief for *amici curiae* International Law Scholars and Human Rights Organization in support of the appellants.

Stephen M. Truitt and *Michael Rapkin* were on brief for *amici curiae* Counsel for Guantanamo Detainees et al. in support of the appellants.

Jerome A. Hoffman and *Christopher C. Lund* were on the brief for *amici curiae* National Association of Evangelicals et al. in support of the cross-appellees.

Jonathan F. Cohn, Deputy Assistant Attorney General, United States Department of Justice, argued the cause for the appellees/cross-appellants. *Peter D. Keisler*, Assistant Attorney General, *Gregory D. Katsas* and *Jeffrey S. Bucholtz*, Principal Deputy Associate Attorneys General, and *Robert M. Loeb* and *Matthew M. Collette*, Attorneys, United States Department of Justice, were on brief. *R. Craig Lawrence*, Assistant United States Attorney, entered an appearance.

Before: HENDERSON, RANDOLPH and BROWN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Separate concurring opinion filed by *Circuit Judge* BROWN.

KAREN LECRAFT HENDERSON, *Circuit Judge*: Appellants Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed and Jamal Al-Harith (plaintiffs or detainees) sued former Secretary of Defense Donald Rumsfeld (Rumsfeld) and defendant military officers[1] (defendants) under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, the Geneva Conventions, 6 U.S.T. 3316 and 6 U.S.T. 3516, the Fifth and Eighth Amendments to the United States Constitution and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, seeking damages for their alleged illegal detention and torture at the United States Naval Base at Guantanamo Bay, Cuba (Guantanamo). The defendants argued in district court that the ATS and Geneva Conventions claims were barred by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (1988) (*amending* 28 U.S.C. §§ 2671, 2674, 2679) and that they were entitled to qualified immunity on the constitutional and RFRA claims. The district court agreed that the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2679 *et seq.*, provided the exclusive remedy for the defendants' allegedly tortious conduct and thus granted the defendants' motion to dismiss the ATS and Geneva Conventions claims. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 30-36 (D.D.C. 2006). The district court also dismissed the constitutional claims, holding that the defendants were entitled to

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[1] The other appellees include Air Force General Richard Myers, Army Major General Geoffrey Miller, Army General James T. Hill, Army Major General Michael E. Dunlavey, Army Brigadier General Michael Lehnet, Army Colonel Nelson J. Cannon, Army Colonel Terry Carrico, Army Lieutenant Colonel William Cline and Army Lieutenant Colonel Diane Beaver.

qualified immunity from suit. *Id.* at 41-44. It denied, however, the defendants' motion to dismiss the RFRA claim. *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58 (D.D.C. 2006). The plaintiffs now appeal the dismissal of the ATS, Geneva Conventions and constitutional claims and the defendants appeal the denial of their motion to dismiss the RFRA claim. For the reasons set forth below, we affirm the district court's dismissal of the ATS, Geneva Conventions and constitutional claims and reverse its denial of the motion to dismiss the RFRA claim.

I.

The complaint alleges the following facts. Shafiq Rasul (Rasul), Asif Iqbal (Iqbal), Rhuhel Ahmed (Ahmed) and Jamal Al-Harith (Al-Harith) are citizens and residents of the United Kingdom. Compl. ¶ 1. Rasul, Iqbal and Ahmed allege that in October 2001 they traveled to Afghanistan from Pakistan to provide humanitarian relief. *Id.* ¶ 35. They claim that General Rashid Dostum, an Uzbek warlord allied with the United States as part of the Northern Alliance, captured them in northern Afghanistan on November 28, 2001 and transferred them to United States custody in Afghanistan one month later. *Id.* ¶¶ 2, 42-44. In early 2002, they were transported to Guantanamo, where they remained as detainees until their repatriation to the United Kingdom in 2004. *Id.* ¶¶ 5, 58-65.

Al-Harith asserts that he traveled to Pakistan on October 2, 2001 to attend a religious retreat. *Id.* ¶ 3. Upon being advised to leave the country because of reported animosity towards British citizens, Al-

Harith alleges that he tried to return to Europe overland via Iran and Turkey. *Id.* According to Al-Harith, while still in Pakistan, the truck in which Al-Harith was traveling was hijacked at gunpoint by Afghans. *Id.* He claims he was then forced into another vehicle which crossed the border into Afghanistan where he was subsequently turned over to the Taliban. *Id.* Al-Harith asserts that the Taliban accused him of being a British spy and imprisoned him. *Id.* He claims he was released in 2001 when the Taliban fell and he contacted British embassy officials to secure his evacuation. *Id.* United States forces, in coordination with British officials, detained Al-Harith and transported him to Guantanamo in February 2002. *Id.* ¶¶ 3-4, 63.

On December 2, 2002, defendant Rumsfeld approved for use at Guantanamo interrogation techniques such as the use of stress positions, intimidation by the use of dogs, twenty-hour interrogation sessions, shaving of detainees' facial hair, isolation in darkness and silence and the use of "mild non-injurious physical contact." *Id.* ¶ 9. Rumsfeld subsequently withdrew approval of these tactics in April 2003. *Id.* ¶ 11. The detainees, however, allege that they were systematically and repeatedly tortured throughout their two-year detention at Guantanamo. *Id.* ¶ 4. For example, they claim they were beaten, shackled in painful stress positions, threatened by dogs, subjected to extreme temperatures and deprived of adequate sleep, food, sanitation, medical care and communication. *Id.* ¶ 6. They also allege that they were harassed while practicing their religion, *id.*, including forced shaving of their beards, banning or interrupting

their prayers, denying them copies of the Koran and prayer mats and throwing a copy of the Koran in a toilet bucket. *Id.* ¶¶ 58, 78, 92, 97, 206.

In addition to Rumsfeld's approval of these interrogation techniques, the detainees assert that the other defendants implemented, supervised and condoned their torture and detention. *See id.* ¶ 154 ("[A]ll [d]efendants were aware that [p]laintiffs were tortured . . . ."); *id.* ¶ 155 ("[A]ll [d]efendants took no steps to prevent the infliction of torture . . . ."); *id* ¶ 156 ("[A]ll [d]efendants authorized and encouraged the infliction of torture . . . ."). For example, plaintiffs allege that defendant Myers, a United States Air Force General and Chairman of the Joint Chiefs of Staff, was informed of the torture and mistreatment of Guantanamo detainees and, as the senior military officer charged with maintaining the custody of the detainees, condoned their torture. *Id.* ¶ 20. They assert that defendant Miller, a Major General in the United States Army, implemented and condoned the torture and mistreatment of Guantanamo detainees as the Commander of Joint Task Force-GTMO. *Id.* ¶ 21. They claim that defendant Hill, a General in the United States Army and Commander of the United States Southern Command, sought approval for several abusive interrogation techniques used on them. *Id.* ¶ 22. They allege that defendant Dunlavey, a Major General in the United States Army, implemented and condoned torture and cruel, inhuman and degrading acts as the Commander of Joint Task Force 160/170, which succeeded Joint Task Force-GTMO at Guantanamo. *Id.* ¶ 23. They assert that defendant Hood, a Brigadier General in the United

States Army, operated the detention facilities at Guantanamo and had supervisory responsibility for the detainees as the Commander of Joint Task Force-GTMO. *Id.* ¶ 24. They claim that defendant Lehnert, a Brigadier General in the United States Marine Corps, was responsible for the construction and operation of Camp X-Ray and Camp Delta at Guantanamo and had supervisory responsibility for detainees. *Id.* ¶ 25. They allege that defendant Cannon, a Colonel in the United States Army, had supervisory responsibility for the detainees as Commander of Camp Delta at Guantanamo. *Id.* ¶ 26. They assert that defendant Carrico, also a Colonel in the United States Army, had supervisory responsibility for the detainees as Commander of Camp Delta and Camp X-Ray at Guantanamo. *Id.* ¶ 27. Finally, they claim that defendant Beaver, a Lieutenant Colonel in the United States Army and Chief Legal Adviser to defendant Dunlavey, provided an opinion purporting to justify the torture and mistreatment of detainees. *Id.* ¶ 28.

The plaintiffs were released in March 2004 and returned to the United Kingdom. *Id.* ¶ 5. On October 27, 2004, they filed a complaint alleging seven causes of action against defendant Rumsfeld and the defendant military officers: (1) prolonged arbitrary detention under the ATS, (2) torture under the ATS, (3) cruel, inhuman or degrading treatment under the ATS, (4) violations of the Geneva Conventions, (5) violations of the Eighth Amendment, (6) violations of the Fifth Amendment and (7) violations of RFRA. Compl. ¶¶ 159-210. They claim they suffered physical and psychological trauma as a result of their detention at

Guantanamo. *Id.* ¶¶ 138-140. On March 16, 2005, all of the defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). *Rasul*, 414 F. Supp. 2d at 29.

The district court dismissed the ATS, Geneva Conventions and constitutional claims, concluding, as discussed *infra* pp. 11-27 that pursuant to the Westfall Act, the FTCA provides the exclusive remedy for torts by a federal official or employee committed within the scope of his employment. *Rasul*, 414 F. Supp. 2d at 31 (citing 28 U.S.C. § 2679(b)(1)). The court held that the ATS and Geneva Conventions claims were covered by the Westfall Act because the defendants' authorization, implementation and supervision of the alleged torture and detention of the detainees was within the scope of their employment. *Id.* at 32-36. Relying on the Restatement (Second) of Agency § 228(1) (1957), the court concluded that the defendants' conduct was incidental to the conduct authorized, *id.* at 33-34, took place within the time and place limitations sanctioned by the United States, *id.* at 34, was done to further the interests of the United States, *id.* at 35-36, and was foreseeable, *id.* at 36. It further ruled that neither the ATS claims nor the Geneva Conventions claim fit within one of the statutory exceptions to the Westfall Act. *Id.* at 36-38. Accordingly, because the plaintiffs had failed to exhaust their administrative remedies as required by the FTCA, *see McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies."), the court

dismissed the claims under Federal Rule of Civil Procedure 12(b)(1). *Rasul*, 414 F. Supp. 2d at 39.

Regarding the two constitutional claims brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),[2] the defendants argued, first, that the plaintiffs had failed to allege the violation of any right protected by the Constitution because the plaintiffs, as Guantanamo detainees, were aliens located outside sovereign United States territory at the time of the alleged violations and therefore did not possess any constitutional right. *Rasul*, 414 F. Supp. 2d at 39. Even assuming the plaintiffs had alleged the violation of such a right, the defendants continued, such a right was not clearly established at the time of the violations.[3] *Id.* at 41-44.

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[2] The holding in *Bivens* permits a plaintiff to bring an action in federal court against a federal officer/employee for the violation of his constitutional rights. 403 U.S. at 389. A *Bivens* suit is the federal counterpart of a claim brought pursuant to 42 U.S.C. § 1983 against a state or local officer/employee for the violation of the claimant's constitutional rights.

[3] In *Saucier v. Katz*, 533 U.S. 194, 201 (2001) the Supreme Court affirmed that under the doctrine of qualified immunity, a federal official alleged to have violated a plaintiff's constitutional right is shielded from liability if the right was not clearly established at the time of the violation. *See also Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) ("'[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))). Although *Saucier* involved a section 1983 claim, "the law of immunity in a *Bivens* claim against a federal official mirrors that in a section 1983 claim against a state official." *Moore v. Valder*, 65 F.3d 189, 192 (D.C. Cir. 1995).

The district court reserved judgment regarding the defendants' first argument because, at the time, the decision in *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), holding that Guantanamo detainees were not entitled to constitutional protection, was on appeal. *Rasul*, 414 F. Supp. 2d at 40-41. It then concluded that the defendants were entitled to qualified immunity from suit under *Bivens* because any constitutional right the detainees possessed was not clearly established at the time it was allegedly violated. *Id.* at 41. Relying on the United States Supreme Court's holdings in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the district court concluded that "the Constitution applies only once aliens were within the territory of the United States and developed substantial contacts in this country." *Id.* at 44.[4] The court noted that "plaintiffs have provided no case law, and the court finds none, supporting a conclusion that military officials would have been

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[4] In *Johnson v. Eisentrager*, the Supreme Court held that German nationals who were convicted of war crimes committed during World War II and were imprisoned at a United States army base in Germany had no constitutional right to test the legality of their detention by way of habeas corpus. In *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment did not apply to a search by DEA agents of a Mexican citizen's residence in Mexico. It summarized *Eisentrager* as "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" and described other cases involving aliens as "establish[ing] only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. at 269, 271.

aware, in light of the state of the law at the time, that detainees should be afforded the rights they now claim." *Id.*

The court reached the opposite conclusion regarding the plaintiffs' RFRA claim. *Rasul*, 433 F. Supp. 2d at 71. As discussed *infra* pp. 35-43, RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless the Government "demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). The district court first considered whether RFRA applied to Guantanamo. *Rasul*, 433 F. Supp. 2d at 62-67. It rejected the defendants' argument that RFRA does not apply extraterritorially based on its interpretation of 42 U.S.C. § 2000bb-2(2), which defines "Government" to include "the District of Columbia, the Commonwealth of Puerto Rico, and each *territory and possession* of the United States." 42 U.S.C. § 2000bb-2(1), (2) (emphasis added). It reasoned that if "territory and possession" "is to have any meaning, it must include lands such as [Guantanamo]," over which the United States exercises "perhaps as much control as it possibly could short of 'ultimate sovereignty.'" *Id.* at 65 (quoting *Rasul v. Bush*, 542 U.S. 466, 475 (2004)). Next, it rejected the defendants' assertion that RFRA does not apply to non-resident aliens. *Id.* at 67. It noted that "RFRA expressly protects the religious exercise of 'persons,' a broadly applicable term, commonly including aliens." *Id.* at 66. It reasoned that "because RFRA

explicitly applies to 'persons,' the defendants, at a bare minimum, must demonstrate that Congress specifically intended to vest the term 'persons' with a definition . . . at odds with its plain meaning" and noted that "the defendants cite no authority to support their construction of RFRA." *Id.* at 67. Accordingly, the district court concluded that "RFRA applies to U.S. government action at the Naval Base in Guantanamo Bay." *Id.*

The district court then rejected the defendants' assertion of qualified immunity from RFRA liability. Applying the first step of *Saucier v. Katz*, 533 U.S. 194, 201 (2001), it held that the facts alleged constituted a violation of RFRA. 433 F. Supp. 2d at 68-69. Specifically, it found that the defendants' alleged harassment of the plaintiffs in the practice of their religion, including "[f]lushing the Koran down the toilet and forcing Muslims to shave their beards," "falls comfortably within the conduct prohibited from government action by RFRA." *Id.* At 69. Applying step two of *Saucier*, the district court found that the plaintiffs' rights under RFRA were clearly established at the time of the alleged violations, declaring that "[t]he statute's unambiguous application to U.S. territories and possessions should have placed the defendants on notice that they were prohibited from the alleged conduct in Guantanamo." *Id.* at 71 (footnote omitted). While "recogniz[ing] that the defendants are not constitutional law scholars well versed on the jurisdictional reach of RFRA," it concluded that "given the abhorrent nature of the allegations and given our Nation's fundamental commitment to religious liberty, it seems to this court that in this

case a reasonable official would understand that what he is doing violates that right." *Id.* at 71 (internal quotations and citations omitted).

The plaintiffs appeal the dismissal of the ATS, Geneva Conventions and *Bivens* claims pursuant to 28 U.S.C. § 1291. The defendants' interlocutory appeal of the denial of qualified immunity on the RFRA claim is pursuant to the collateral order doctrine "'to the extent that [the denial] turns on an issue of law.'" *Int'l Action Ctr. v. United States*, 365 F.3d 20, 23 (D.C. Cir. 2004) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

II.

We review the district court's legal conclusions *de novo*. *Cummings v. Dep't of the Navy*, 279 F.3d 1051, 1053 (D.C. Cir. 2002) ("'[W]e apply the *de novo* standard of review to the district court's application of law to undisputed fact[s].'" (quoting *Artis v. Greenspan*, 158 F.3d 1301, 1306 (D.C. Cir. 1998)) (alterations in *Cummings*)). We "accept as true the facts that [the plaintiffs] allege[] in [their] complaint" in reviewing the district court's disposition of the defendants' motion to dismiss. *Id.* at 1053.

A. *The ATS Claims*

The plaintiffs brought three claims for violations of the law of nations pursuant to the Alien Tort Statute (ATS) based on the defendants' alleged infliction of "prolonged arbitrary detention," Compl. ¶¶ 159-66, "torture," *id.* ¶¶ 167-72, and "cruel,

inhuman or degrading treatment." *Id.* ¶¶ 173-79. As noted earlier, the plaintiffs claim that they were beaten, shackled in painful stress positions, threatened by dogs, subjected to extreme temperatures, deprived of adequate sleep, food, sanitation, medical care and communication and harassed while practicing their religion. *Id.* ¶ 6. They assert that, in December 2002, defendant Rumsfeld approved the use of these interrogation techniques and others, including shaving of detainees' facial hair, isolation in darkness and silence and the use of "mild noninjurious physical contact." *Id.* ¶ 9. According to the plaintiffs, the other defendants authorized, implemented, supervised and condoned their torture and detention, *id.* ¶¶ 20-28, 154-56, and thereby violated customary international law. *Id.* ¶¶ 163, 169, 176.

The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The district court concluded, however, that pursuant to the Westfall Act, the plaintiffs' claims were cognizable only under the FTCA because the defendants' alleged conduct occurred within the scope of their office/employment. *Rasul*, 414 F. Supp. 2d at 36. It then held that it lacked subject matter jurisdiction because the plaintiffs failed to exhaust their administrative remedies as required by the FTCA. *Id.* at 39 (citing *Simpkins v. District of Columbia Gov't*, 108 F.3d 366, 371 (D.C. Cir. 1997) ("This court and the other courts of appeals have treated the FTCA's requirement of filing an administrative complaint with the

appropriate agency prior to instituting an action as jurisdictional.")).[5]

> In pertinent part, the Westfall Act provides:
>
> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). By this provision, the Westfall Act makes the FTCA remedy "exclusive of any other civil action or proceeding for money damages" for any tort committed by a federal official or employee "while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1).

While the Attorney General's certification "'does not conclusively establish as correct the substitution of the United States as defendant in place of the employee,'" it constitutes "prima facie evidence that the employee was acting within the scope of his employment." *Council on Am. Islamic*

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[5] *See* discussion *infra* pp. 23-25.

Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir. 2006) (per curiam) (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)). The plaintiffs bear the burden of challenging the certification by "'coming forward with specific facts rebutting the certification.'" *Ballenger*, 444 F.3d at 662 (quoting *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003)). The court then determines whether the conduct falls within the scope of employment, conducting an evidentiary hearing if necessary. *Kimbro v. Velten*, 30 F.3d 1501, 1508 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (citing *Wang v. United States*, 947 F.2d 1400, 1402 (9th Cir. 1991); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994)). If the court determines that the employee acted within the scope of his employment, "the case is, *inter alia*, restyled as an action against the United States that is governed by the [FTCA]." *Ballenger*, 444 F.3d at 662.

"Scope of employment questions are governed by the law of the place where the employment relationship exists." *Majano v. United States*, 469 F.3d 138, 141 (D.C. Cir. 2006). We look,then, "to the decisions of the Court of Appeals for the District of Columbia for our guidance on the local law." *Id.* "'As its framework for determining whether an employee acted within the scope of employment, the Court of Appeals for the District of Columbia looks to the Restatement (Second) of Agency (1957).'" *Id.* (quoting *Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995), *overruled on other grounds*, *Osborn v. Haley*, 127 S. Ct. 881 (2007)). According to the Restatement, the "'[c]onduct of a servant is within the scope of employment if, but only if: (a) it is of the

kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.'" *Ballenger*, 444 F.3d at 663 (quoting Restatement (Second) of Agency § 228(1) (1958)). "'Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.'" *Id.* (quoting Restatement (Second) of Agency § 228(2)).

On March 10, 2005, the Attorney General duly certified that "[o]n the basis of the information now available," all of the defendants were acting within the scope of their employment "at the time of the conduct alleged in the complaint." Certification of Scope of Employment (App. 60.) Applying the four Restatement factors, the district court concluded that "the alleged actions of the defendants were within the scope of their employment." 414 F. Supp. 2d at 36. First, it agreed with the defendants that their alleged authorization, implementation and supervision of torture was "'incidental to the conduct authorized.'" *Id.* at 33 (quoting Restatement (Second) of Agency § 229). It noted that the United States authorized military personnel in Guantanamo "to exercise control over the detainees and question the detainees while in the custody of the United States," *id.* at 34 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)), and that "torture is a foreseeable consequence of the military's detention of suspected enemy

combatants." *Id.* It also emphasized that the "complaint alleges torture and abuse tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein." *Id.* Examining the second factor, the district court observed that "the parties do not dispute that the defendants' actions took place within the time and place limitations sanctions [sic] by the United States." *Id.* Regarding the third factor, the district court ruled that the defendants "were acting, at least in part, to further the interests of their employer, the United States." *Id.* at 35-36. It noted that the plaintiffs did "not allege that the tortious actions arose purely from personal motives, but claim[ed] that the defendants' actions are inextricably intertwined with their respective roles in the military." *Id.* at 35. It also observed that "[t]he plaintiffs have not proffered any evidence that would lead this court to believe that the defendants had any motive divorced from the policy of the United States to quash terrorism around the world." *Id.* And regarding the fourth factor, the district court concluded that while the alleged "aggressive techniques may be sanctionable within the military command, . . . the fact that abuse would occur is foreseeable." *Id.* at 36. It emphasized that "the heightened climate of anxiety, due to the stresses of war and pressures after September 11 to uncover information leading to the capture of terrorists, would naturally lead to a greater desire to procure information and, therefore, more aggressive techniques for interrogations." *Id.*

The plaintiffs do not contest that the second, third and fourth factors listed in section 228(1) of the Restatement support the conclusion that the

defendants acted within the scope of their employment in authorizing, implementing, supervising and condoning the plaintiffs' alleged torture and detention. They do challenge the district court's conclusion that the defendants' alleged authorization, supervision and implementation of torture was incidental to the conduct authorized, claiming that the defendants' conduct "was never authorized," was "seriously criminal," "has long [been] condemned" by the United States and was a "substantial departure from the government's 'normal method' of detaining and interrogating persons of interest." Appellant's Br. 22, 25. Alternatively, the plaintiffs assert that even if the defendants' conduct falls within the scope of their employment, their claims come within the exception included in the Westfall Act for "a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). Finally, the plaintiffs argue that the district court erred in dismissing their claims without allowing them to conduct discovery.

1. *Scope of Employment*

According to the detainees, we cannot conclude that the formulation, approval and implementation of a policy of torture is "of the kind" of conduct the defendants were employed to perform. To be "of the kind" of conduct an individual is employed to perform, the Restatement explains that the "conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Restatement (Second) of Agency §

229(1). The defendants respond that "[w]here high-level military officials are charged with winning the war on terror, and specifically with detaining and obtaining information from suspected terrorists, the officials' policies on detention and interrogation, and their supervision of the implementation of those policies, is at least 'incidental' to those duties." Appellees' Br. 18.[6]

In *Haddon*, we held that whether conduct is incidental depends on whether the conduct is a "direct outgrowth" of an employment assignment:

> According to the D.C. Court of Appeals, conduct is "incidental" to an employee's legitimate duties if it is "foreseeable." "Foreseeable" in this context does not carry the same meaning as it does in negligence cases; rather, it requires the court to determine whether it is fair to charge employers with responsibility for the intentional torts of their employees. To be foreseeable, the torts must be "'a direct outgrowth of the employee's instructions or job assignment.'"

68 F.3d at 1424 (quoting *Boykin v. District of Columbia*, 484 A.2d 560, 562 (D.C. 1984) (quoting *Penn Cent. Transp. Co. v. Reddick*, 398 A.2d 27, 32 (D.C. 1979))).

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[6] Although the plaintiffs also assert that the defendants' alleged conduct was not "the same general nature as was authorized," Restatement (Second) of Agency § 229(1), we need not reach this issue because of our conclusion that the alleged conduct was "incidental to the conduct authorized."

More recently, in *Ballenger*, although we did not explicitly use *Boykin's* "direct outgrowth language," we nonetheless emphasized that whether conduct is incidental depends "on the underlying dispute or controversy, not on the nature of the tort." 444 F.3d at 664 (internal quotation omitted). We explained that the "incidental" prong "is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer's behalf." *Id.* (internal quotation omitted). In *Ballenger*, we examined whether a congressman's allegedly defamatory comments made during a telephone conversation fell within the scope of his office. We explained that "[t]he appropriate question, then, is whether that telephone conversation—not the allegedly defamatory sentence—was the kind of conduct Ballenger was employed to perform." *Id.* Because "[s]peaking to the press during regular work hours in response to a reporter's inquiry falls within the scope of a congressman's 'authorized duties,'" we held that the allegedly defamatory statement was incidental to his office. *Id.* at 664-65.

Similarly, in *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976), this Court upheld a jury verdict holding a deliveryman's employer liable because the employee acted within the scope of his employment when he assaulted and raped a customer. The Court reasoned that the assault "arose naturally and immediately between [the deliveryman] and the plaintiff about two items of great significance in connection with his job[:] the request of the plaintiff . . . to inspect the mattress and springs before payment . . . and [the deliveryman's] insistence on getting cash rather than a check." *Id.* at 652. The Court also noted that

"[t]he dispute arose out of the very transaction which had brought [the deliveryman] to the premises." *Id;* *see also Johnson v. Weinberg*, 434 A.2d 404, 409 (D.C. 1981) (upholding jury verdict that laundromat employee acted within scope of his employment when he shot customer during dispute over removal of clothes from washing machine because "[t]he assault arose out of the transaction which initially brought [the customer] to the premises . . . and was triggered by a dispute over the conduct of the employer's business"); *Howard Univ. v. Best*, 484 A.2d 958, 987 (D.C. 1984) (holding that jury could reasonably find that university dean acted within scope of employment when he sexually harassed faculty member during faculty, administrative and other professional meetings).

In contrast, the District of Columbia courts have held that tortious conduct is not "incidental" to the performance of authorized duties if the conduct underlying the tort is unrelated to the employee's instructions or job assignment. For example, in *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27 (D.C. 1979), the court held that a railroad employee was not acting within the scope of his employment when he kicked a taxicab driver while traveling between work sites. It concluded that the employee's action "was neither a direct outgrowth of [his] instructions or job assignment, nor an integral part of the employer's business activity," noting that "nothing in the business of running a railroad . . . makes it likely that an assault will occur between a railroad brakeman and a taxicab driver over the celerity with which the latter will provide a taxicab ride to the former." *Id.* at 32; *see also Boykin*, 484

A.2d at 564 (teacher was not acting within scope of employment when he sexually assaulted student because teacher was not then performing teaching responsibilities). And our court, in *Haddon*, held that a White House electrician was not acting within the scope of his employment when he threatened the White House chef with physical harm. 68 F.3d at 1425. We noted that the electrician's "alleged tort did not arise directly out of his instructions or job assignment as a White House electrician" because "[u]nlike the rape in *Lyon* and the shooting in *Johnson*, the electrician's threat did not stem from a dispute over the performance of *his* work." *Id.* (emphasis in original). We also observed that "[u]nlike the sexual harassment in *Howard University*, the electrician was not performing his assigned duties at the time of the incident." Instead, we concluded that his conduct was "closer to the kick in *Penn Central* and the assault in *Boykin*" because "[a]s in those cases, the electrician's conduct was completely unrelated to his official responsibilities." *Id.*

The plaintiffs concede that the "torture, threats, physical and psychological abuse inflicted" on them, which were allegedly approved, implemented, supervised and condoned by the defendants, were "intended as interrogation techniques to be used on detainees." Compl. ¶ 141. In fact, as the district court correctly noted, "the complaint alleges torture and abuse tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein." 414 F. Supp. 2d at 34. Under *Ballenger*, then, the underlying conduct—here, the detention and interrogation of

suspected enemy combatants—is the type of conduct the defendants were employed to engage in. Just as the telephone conversation in *Ballenger*, the mattress delivery in *Lyon* and the removal of clothes from the washing machine in *Thompson* was each part of the employee's job description or assignment, the detention and interrogation of suspected enemy combatants is a central part of the defendants' duties as military officers charged with winning the war on terror. *See Ballenger*, 444 F.3d at 664; *Lyon*, 533 F.2d at 652; *Johnson*, 434 A.2d at 409. While the plaintiffs challenge the methods the defendants used to perform their duties, the plaintiffs do not allege that the defendants acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence. *Cf. Penn Cent.*, 398 A.2d at 32; *Boykin*, 489 A.2d at 564. Therefore, the alleged tortious conduct was incidental to the defendants' legitimate employment duties.

Section 229(2)(j) of the Restatement (Second) of Agency provides, in pertinent part, that "[i]n determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered: . . . whether or not the act is seriously criminal."[7] In alleging that the defendants formulated, approved and implemented a policy of torture, the plaintiffs have plainly alleged

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[7] Comment f to section 229(2) states that "[t]he fact that the act done is a serious crime is a factor indicating that it is not in the scope of employment."

"seriously criminal" conduct. But criminal conduct is not *per se* outside the scope of employment. *See* Restatement (Second) of Agency § 231 ("An act may be within the scope of employment although consciously criminal or tortious."); *Johnson*, 434 A.2d at 409 (laundromat employee shot customer over laundry dispute); *Lyon*, 533 F.2d at 652 (deliveryman assaulted and raped customer following delivery dispute); *Brown v. Argenbright Sec., Inc.*, 782 A.2d 752, 758 (D.C. 2001) (rule that sexual assaults are automatically outside scope of employment "too broad").

Citing § 229(2)(j) of the Restatement, the plaintiffs argue nonetheless that the serious criminality of the defendants' alleged conduct precluded the district court from holding—as a matter of law—that their conduct was within the scope of their employment. Here, however, the district court apparently assumed the truth of the plaintiffs' allegation that the defendants' conduct was seriously criminal. 414 F. Supp. 2d at 34 (concluding that "torture and inhumane treatment wrought upon captives by their captors" was "'direct outgrowth of the employees' instructions and job assignment'") (quoting *Haddon*, 68 F.3d at 1424) (alteration omitted). Accordingly, regardless whether the court or a jury resolves factual disputes in a Westfall Act action,[8] nothing would be gained by an

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[8] Unlike the determination of scope of employment in a respondeat superior case in the District of Columbia, where under local law the issue *is* a jury question, *see e.g.*, *Johnson*, 434 A.2d at 407-09; *Lyon*, 533 F.2d at 652, our precedent holds that the court determines whether conduct falls within the scope of employment under the Westfall Act, conducting an

evidentiary hearing because the plaintiffs could, at most, simply re-establish that the defendants' conduct was seriously criminal. Where, as here, there are no material facts in dispute, the court may decide a Rule 12(b) motion as a matter of law. *See,*

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evidentiary hearing only if necessary to resolve factual disputes. *See Kimbro*, 30 F.3d at 1509 ("If there is a material dispute as to the scope [of employment] issue the district court must resolve it at an evidentiary hearing."); *Stokes v. Cross*, 327 F.3d 1210, 1214 (D.C. Cir. 2003) (same); *cf. Jamison v. Wiley*, 14 F.3d 222, 236 (4th Cir. 1994) ("The federal courts of appeals have consistently recognized that a district court has the power to hold a limited evidentiary hearing to resolve factual disputes that bear on a scope-of-employment issue properly before it in a Westfall Act case."). In a more recent case, we reversed the district court's grant of summary judgment based on its conclusion as a matter of law that the defendant Smithsonian employee acted within the scope of her employment under the Westfall Act. *Majano v. United States*, 469 F.3d 138 (D.C. Cir. 2006). In *Majano*, we remanded to the district court in light of a factual dispute and included the comment that "scope of employment questions are generally viewed as questions of fact best resolved by a jury." *Id.* at 140. At oral argument here, the plaintiffs' counsel maintained that the *Majano* comment makes the scope of employment under the Westfall Act a jury question. *See* Recording of 9/14/2007 Oral Argument at 7:45-8:32 ("Under *Majano*, [scope of employment] would be a jury [question]. Under *Kimbro v. Velten*, the initial suggestion was that it would be an evidentiary hearing before a court after discovery. . . . *Majano* seemed to move from *Kimbro v. Velten* and suggest that it was a jury issue."). But the *Majano* holding does not retreat from *Kimbro*, which case had earlier made clear that the court is to decide any factual dispute in a Westfall Act action. *Kimbro*, 30 F.3d at 1509. Both *Kimbro* and *Majano* disposed of Westfall Act actions as a matter of law, *Kimbro* by granting a motion to dismiss, *Majano* by granting summary judgment; *Kimbro* expressly instructed the district court to resolve any factual dispute while *Majano* simply noted the existence of a factual dispute and remanded without mentioning *Kimbro*.

e.g., *Ballenger*, 444 F.3d at 663 (affirming district's court dismissal of tort claim based on determination that defendant acted within scope of employment).

If conduct *is* seriously criminal, the Restatement explains that it is generally less likely that the conduct comes within the scope of employment:

> The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do.

Restatement (Second) of Agency § 231 cmt. a.

While it may generally be unexpected that seriously criminal conduct will arise "in the prosecution of the business," here it *was* foreseeable that conduct that would ordinarily be indisputably "seriously criminal" would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants. As in

Lyon, the tortious conduct "was triggered . . . or motivated or occasioned by . . . the conduct then and there of the employer's business" even though it was seriously criminal. *Lyon*, 533 F.2d at 655; *see also Johnson*, 434 A.2d at 409 (laundromat employee acted within scope of employment because "[the employee] had no previous relations with [the victim] which would indicate that the tort was personal" and "[n]o subject unrelated to the [laundry] was ever made a part of the conversation between the men"). Therefore, the allegations of serious criminality do not alter our conclusion that the defendants' conduct was incidental to authorized conduct.[9]

Because the defendants' alleged conduct came within the scope of their office/employment, the three ATS claims were properly "restyled as [claims] against the United States that [are] governed by the [FTCA]." *Ballenger*, 444 F.3d at 662; *see Rasul*, 414 F. Supp. 2d at 38-39. Although the district court did not elaborate—and the parties similarly do not discuss it—we must examine whether the restyled claims against the United States were properly dismissed for lack of jurisdiction. The district court stated only that "[b]ecause the plaintiffs in this case did not proceed against the United States, they did not first present their claim to the appropriate Federal agency" and therefore "the plaintiffs have not exhausted their administrative remedies." 414 F. Supp. 2d at 39.

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[9] While the plaintiffs do not rely on the other nine factors listed in section 229, they do contend that the district court erroneously determined the scope of employment without allowing discovery thereto. *See infra* pp. 25-27.

The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." 28 U.S.C. § 2675(a). As noted earlier, *supra* p. 12, we view the failure to exhaust administrative remedies as jurisdictional. *See Simpkins*, 108 F.3d at 371. Accordingly, section 2675(a) required the plaintiffs to file an administrative claim with either the Department of Defense (DoD) or the appropriate military department before bringing suit. *See* 28 C.F.R. § 14.1 (under FTCA, "terms Federal agency and agency . . . include the executive departments [and] the military departments"). Since their release in 2004 at least, the plaintiffs have presumably been able to comply with the exhaustion requirements of FTCA—indeed, they do not argue otherwise. The record is devoid, however, of any suggestion that they complied with any of the procedures governing the filing of an administrative claim with DoD or one of the military departments.[10] Accordingly, the

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[10] *See* 28 C.F.R. § 14.2(a) ("[A] claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing . . . ."); 32 C.F.R. § 750.6(b) (claim against Department of the Navy submitted to "Tort Claims Unit Norfolk," "Office of the Judge Advocate General," "commanding officer of the Navy or Marine Corps activity involved if known, the commanding officer of any Navy or Marine activity, preferably the one nearest to where the

district court properly dismissed the three ATS claims for lack of subject matter jurisdiction.[11]

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accident occurred, or the local Naval Legal Service Command activity"); *id.* § 842.4 (claim against Department of the Air Force filed "at the base legal office of the unit or installation at or nearest to where the accident or incident occurred"); *id.* §§ 536.3, 536.25 (claim against Department of the Army handled by "area claims office" or "claims processing office").

[11] The detainees argue in the alternative that even if an employee's conduct is within the scope of his employment, the Westfall Act "does not extend or apply to a civil action" brought (1) "for a violation of the Constitution of the United States" or (2) "for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A)-(B). The plaintiffs maintain that the first exception applies because they allege Eighth and Fifth Amendment claims (Counts V-VI) in addition to their ATS claims (Counts I-III) and that "civil action" refers to the entire action rather than an individual claim. Yet, as the First Circuit has observed, "[w]here a single case involves multiple claims, certification is properly done at least down to the level of individual claims and not for the entire case viewed as a whole." *Lyons v. Brown*, 158 F.3d 605, 607 (1st Cir. 1998). This court—as have a number of other circuits—has permitted the substitution of the United States if a claim within the Westfall Act exception is joined with unexcepted claims. *See, e.g.*, *Simpkins v. District of Columbia Gov't*, 108 F.3d 366, 368, 370-71 (D.C. Cir. 1997) (substituting United States for defendant on common law tort claims notwithstanding defendant also charged with constitutional claims); *see also RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1132, 1142-44 (6th Cir. 1996) (substituting United States for defendant on common law tort claims notwithstanding additional Sherman Act and Lanham Act claims); *Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 867 (9th Cir. 1992) (substituting United States for defendant on common law tort claims notwithstanding additional *Bivens* claims); *Duffy v. United States*, 966 F.2d 307, 309, 314 (7th Cir. 1992) (substituting United States for defendant on common law tort claims

2. *Discovery*

The plaintiffs assert that the district court erred by dismissing their claims without allowing discovery on the scope of employment question. But discovery is not warranted if "the plaintiff 'did not allege any facts in his complaint or in any subsequent filing . . . that, if true, would demonstrate that [the defendant] had been acting outside the scope of his employment.'" *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003) (alteration in *Stokes*) (quoting *Singleton v. United States*, 277 F.3d 864, 871 (6th Cir. 2002)). For example, in *Stokes*, a federal employee (Stokes) sued coworkers for defamation arising from their statements that Stokes had failed to perform his duties as a law enforcement officer of the United States Government Printing Office. *Id.* at 1212. Stokes alleged that coworkers "destroy[ed] critical evidence, prepar[ed] and submit[ted] false affidavits by use of threat and coercion, and engag[ed] in other criminal acts." *Id.* at 1216. While noting that "[i]t is unclear whether evidence of such conduct alone would be sufficient under District of Columbia law," we recognized that evidence of such conduct might reveal the coworkers' "intent to prevent the best candidate, namely Stokes, from getting [a] promotion . . . [and] indicate that they had maliciously acted contrary to their employer's interest and, therefore, outside the scope of their employment." *Id.* Accordingly, we decided that

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notwithstanding additional *Bivens* and 42 U.S.C. § 1985 claims). Accordingly, the plaintiffs' claims do not fall within the first exception to the Westfall Act and they do not rely on the second exception thereto.

Stokes was entitled to "at least limited discovery on the scope-of-employment issue." *Id.* In contrast, even if the detainees were to establish that the defendants authorized, implemented, supervised and condoned torture and detention based on evidence obtained through discovery, the defendants' conduct would nonetheless fall within the scope of their employment because the defendants were employed to detain and interrogate suspected enemy combatants and the plaintiffs concede that the alleged torture and detention were "intended as interrogation techniques to be used on detainees." Compl. ¶ 141. The plaintiffs thus failed to allege any facts that, if proven, would establish that the defendants were acting outside the scope of their employment and the district court did not abuse its discretion in denying the plaintiffs discovery. *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 737 (D.C. Cir. 2007) ("'The district court has broad discretion in its handling of discovery, and its decision to allow or deny discovery is reviewable only for abuse of discretion.'" (quoting *Brune v. IRS*, 861 F.2d 1284, 1288 (D.C. Cir. 1988))).

B. *The Geneva Conventions Claim*

Similar to Counts I-III, Count IV of the plaintiffs' complaint alleges that they were "held arbitrarily, tortured and otherwise mistreated during their detention" in violation of the Geneva

Conventions.[12] Compl. ¶ 181. As already noted, the Westfall Act provides that "'[t]he remedy against the Government under the FTCA 'is exclusive of any other civil action or proceeding for money damages . . . against the employee' and then reemphasizes that '[a]ny other civil action or proceeding for money damages . . . against the employee . . . is precluded.'" *United States v. Smith*, 499 U.S. 160, 165-66 (1991) (quoting 28 U.S.C. § 2679(b)(1)). The plaintiffs' claim based on the Geneva Conventions is for money damages and the alleged conduct falls within the defendant's scope of employment for the reasons discussed *supra* pp. 16-23. Similarly, the plaintiffs' argument that the first exception to the Westfall Act applies because they alleged Eighth and Fifth Amendment claims (Counts V-VI) in addition to their Geneva Conventions claim is rejected for the reasons discussed *supra* note 11. The Geneva Conventions claim is therefore precluded by the Westfall Act and the district court properly dismissed the claim for failure to exhaust administrative remedies. *See Simpkins*, 108 F.3d at 371.

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[12] Neither the plaintiffs' complaint nor their briefs identify those portions of the Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, or the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, the defendants allegedly violated.

C. *The Bivens Claims*

The plaintiffs assert two *Bivens* claims for violations of their Fifth and Eighth Amendment rights. They allege that the defendants' challenged conduct constituted cruel and unusual punishment in violation of the Eighth Amendment. Compl. ¶ 186. Additionally, they claim that the "cruel, inhuman or degrading" conditions at Guantanamo violated their substantive due process rights and their "arbitrary and baseless detention" violated their procedural due process rights, both in violation of the Fifth Amendment. Compl. ¶¶ 194-95. The defendants first respond that the detainees, as aliens located outside sovereign United States territory at the time of the alleged violations, had no rights protected by the Constitution. Even assuming the plaintiffs were protected by the Constitution, the defendants submit that any rights they possessed thereunder were not clearly established at the time of the alleged violations and the defendants are therefore entitled to qualified immunity from suit pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and their progeny.

We recently held that Guantanamo detainees lack constitutional rights because they are aliens without property or presence in the United States, *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007). *Boumediene* involved a Suspension Clause[13]

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[13] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

challenge to the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2740-44 (2005) (DTA) (amending 28 U.S.C. § 2241), and the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (2006) (MCA) (amending 28 U.S.C. § 2241). The DTA was enacted in response to the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004), *see Boumediene*, 476 F.3d at 985, which held that federal courts have subject matter jurisdiction over petitions filed by Guantanamo detainees seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2241. The DTA stripped federal courts of subject matter jurisdiction over detainees' habeas petitions except as provided therein. DTA § 1005(e), 119 Stat. at 2742 ("Except as provided in section 1005 [creating Combatant Status Review Tribunal], no court, justice, or judge shall have jurisdiction to hear or consider . . . (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba . . . ."). The next year, the Supreme Court held that the DTA did not apply to habeas petitions pending at the time the DTA was enacted. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006) ("[W]e conclude that [the DTA] does not strip federal courts' jurisdiction over [habeas] cases pending on the date of the DTA's enactment."). In response to *Hamdan*, the Congress passed the MCA, making the DTA retroactive. MCA § 7(b), 120 Stat. at 2636 ("The amendment [ousting the courts of subject matter jurisdiction over detainees' habeas

petitions] shall take effect on the date of the enactment of this Act, and *shall apply to all cases, without exception*, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." (emphasis added)).

We held in *Boumediene* that neither the DTA nor the MCA violates the Suspension Clause based in part on our determination that "[p]recedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States." 476 F.3d at 991. First, we explained that the "controlling case" was *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which involved German nationals convicted of war crimes who were held at a United States army base in Germany and who filed habeas petitions to challenge their convictions and imprisonment. The Supreme Court rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," holding that the German nationals had no constitutional right to petition for habeas corpus relief under the Fifth Amendment. *Id.* at 783. We concluded in *Boumediene* that any difference between Guantanamo and the United States army prison in Germany was "immaterial" because "[t]he text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba not the United States—has sovereignty over Guantanamo Bay." *Boumediene*, 476 F.3d at 992. We

noted that the Supreme Court decision following *Eisentrager* held that the Fourth Amendment did not protect a nonresident alien from a DEA agent's allegedly unreasonable search and seizure carried out in Mexico. *Id.* at 991 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)). We observed that the Supreme Court "found it 'well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders.'" *Id.* at 991-92 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)). We rejected the detainees' reliance on the *Insular Cases*,[14] distinguishing those cases on the ground that the Congress had exercised its power to regulate those territories, whereas "[h]ere Congress and the President have specifically disclaimed the sort of territorial jurisdiction they asserted in Puerto Rico, the Philippines, and Guam." *Id.* at 992. Finally, we explained that "[p]recedent in this circuit also forecloses the detainees' claims to constitutional rights," noting that we had previously held that "'non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States'" and that a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *Id.* (quoting *Pauling v. McElroy*, 278

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[14] In the *Insular Cases*, the Supreme Court extended "fundamental personal rights" to United States territories. *See Balzac v. Porto* [sic] *Rico*, 258 U.S. 298, 312-13 (1922); *Dorr v. United States*, 195 U.S. 138, 148 (1904). As noted in *Boumediene*, "in each of those cases, Congress had exercised its power under Article IV, Section 3 of the Constitution to regulate 'Territory or other Property belonging to the United States,' U.S. Const., art. IV, § 3, cl. 2." 476 F.3d at 992.

F.2d 252, 254 n.3 (D.C. Cir. 1960); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

The plaintiffs nonetheless assert that *Boumediene* conflicts with the Supreme Court's holding in *Rasul*. *Rasul* reversed our decision in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), in which we had held that the federal court's habeas jurisdiction did not extend to aliens detained by United States military forces outside the United States. 321 F.3d at 1144. Although the holding was limited to the jurisdictional question, the *Al Odah* opinion included a discussion of whether basic constitutional protections were available to aliens abroad. Relying on *Eisentrager*, *inter alia*, we concluded that detainees were not entitled to due process, *id.* at 1141, and accordingly, "[w]e cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not." *Id.* But in *Rasul*, the Supreme Court, significantly, did not reach the issue of whether Guantanamo detainees possess constitutional rights and instead based its holding on 28 U.S.C. § 2241 only. *Rasul*, 542 U.S. at 478-84. For example, the Court explained that "persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review." *Id.* at 478. It emphasized that "[w]hat is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing." *Id.* at 485. Thus,

Boumediene does not conflict with *Rasul* and remains the law of this Circuit.[15]

Even assuming *arguendo* the detainees can assert their Fifth and Eighth Amendment claims, those claims are nonetheless subject to the defendants' assertion of qualified immunity. In determining whether qualified immunity applies, as we earlier noted,[16] the court must first determine whether "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* at 201. "A constitutional right was 'clearly established' at the time of the events in question only if '[t]he contours of the right [were] sufficiently clear that a reasonable officer would understand that what he [was] doing violate[d] that right.'" *Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001)

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[15] *Boumediene* is currently before the Supreme Court on certiorari review. Nevertheless, we must follow Circuit precedent until and unless it is altered by our own *en banc* review or by the High Court. *See United States v. Carson*, 455 F.3d 336, 384 n.43 (D.C. Cir. 2006) ("[W]e are, of course, bound to follow circuit precedent absent contrary authority from an en banc court or the Supreme Court." (citing *Brewster v. Comm'r*, 607 F.2d 1369, 1373 (D.C. Cir. 1979))).

[16] *See supra* note 3.

(quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (alterations in *Butera*)).[17]

The plaintiffs argue that a reasonable person would have been on notice that the defendants' alleged conduct was unconstitutional because the "prohibition on torture is universally accepted." Appellants' Br. 38. The issue we must decide, however, is whether the rights the plaintiffs press *under the Fifth and Eighth Amendments* were clearly established at the time of the alleged violations.

An examination of the law at the time the plaintiffs were detained reveals that even before *Boumediene*, courts did not bestow constitutional rights on aliens located outside sovereign United States territory. Supreme Court and Circuit precedent, consistent with *Eisentrager*'s rejection of the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," concluded that non-resident aliens enjoy no constitutional rights. *Eisentrager*, 339 U.S. at 783; *see, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 269 (Fourth Amendment did not apply to the search and seizure of an alien's Mexican residence); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) ("The Supreme Court has long held that non-resident aliens who have

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[17] Because *Boumediene* was then pending in our Court, the district court assumed the first step of the *Saucier* inquiry and proceeded to analyze "whether the plaintiffs' alleged constitutional rights were clearly established at the time of the alleged abuse." 414 F. Supp. 2d at 41.

insufficient contacts with the United States are not entitled to Fifth Amendment protections."); *People's Mojahedin Org. of Iran. v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) (Cuban and Haitian refugees at Guantanamo Bay lacked First and Fifth Amendment rights). In light of this precedent, we agree with the district court that "[t]he plaintiffs have provided no case law, and the court finds none, supporting a conclusion that military officials would have been aware, in light of the state of the law at the time, that detainees should be afforded the rights they now claim." 414 F. Supp. 2d at 44.

Finally, the plaintiffs contend that they were not *nonresident* aliens while they were at Guantanamo because the law recognized Guantanamo as sovereign United States territory at the time of the alleged violations. They are mistaken. The United States entered into an indefinite lease with Cuba in 1903 for the Guantanamo Bay Naval Base. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418, Art. III. The lease provides that "the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba*" and "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." *Id.* (emphasis added). Precedent regarding other leased military bases also supported the conclusion that

Guantanamo is not a United States territory. For example, in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390 (1948), the Supreme Court stated that a leased military base in Bermuda was "beyond the limits of national sovereignty." Similarly, in *Eisentrager*, the Court held that a United States military prison in Germany was outside the sovereign territory of the United States. 339 U.S. at 778. Based on the plain text of the lease and on case law, it was not clearly established at the time of the alleged violations—nor even today—that a reasonable officer would know that Guantanamo is sovereign United States territory.[18] Accordingly, we affirm the district court's dismissal of the plaintiffs' two constitutional claims.

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[18] Since the plaintiffs' release, we have held that Guantanamo is *not* sovereign United States territory. *Boumediene*, 476 F.3d at 992 ("The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States–has sovereignty over Guantanamo Bay."); *see also Rasul v. Bush*, 542 U.S. 466, 475 (2004) (characterizing Guantanamo Bay as a "territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty'"); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2740-44 (2005) (provision detailing status review procedure for detainees entitled "Procedures for Status Review of Detainees *Outside* the United States") (emphasis added). *But see Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in the judgment) ("Guantanamo Bay is in every practical respect a United States territory . . . ."). As noted, *Boumediene* is currently before the Supreme Court on certiorari review.

D. *The RFRA Claim*

The plaintiffs' final claim alleges that the defendants "inhibited and constrained religiously motivated conduct central to Plaintiffs' religious beliefs," "imposed a substantial burden on Plaintiffs' abilities to exercise or express their religious beliefs" and "regularly and systematically engaged in practices specifically aimed at disrupting Plaintiffs' religious practices" in violation of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*. Compl. ¶¶ 204-208. RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless it can demonstrate that "application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)-(b). As noted, the district court determined that RFRA applied to Government action at Guantanamo, rejecting the defendants' assertion that RFRA does not apply to non-resident aliens.[19] 433 F. Supp. 2d at

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[19] The district court found it necessary to conclude that Guantanamo is a "territory and possession of the United States" in order to allow the plaintiffs' RFRA claim to proceed. *Rasul*, 433 F. Supp. 2d at 62-66. Guantanamo's status, however, is not determinative of RFRA's applicability. Section 2000bb-2(1) defines "government" as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." Whether or not "covered entity," which includes "each territory and possession of the United States," § 2000bb-2(2), applies to Guantanamo, the defendants are "official[s] of the United States" and therefore RFRA applies to their actions.

59, 67. It observed that "RFRA expressly protects the religious exercise of 'persons,' a broadly applicable term, commonly including aliens," *id.* at 66, and reasoned that "because RFRA explicitly applies to 'persons,' the defendants, at a bare minimum, must demonstrate that Congress specifically intended to vest the term 'persons' with a definition . . . at odds with its plain meaning," *id.* at 67. It concluded that the defendants had not done so and therefore denied their motion to dismiss the RFRA claim.[20] *Id.*

A distinct issue is whether RFRA applies extraterritorially regardless whether the defendants satisfy § 2000bb-2's definition of "government." While there is a presumption against the extraterritorial application of a statute absent a "clear statement" to the contrary, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (*superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071), the legislative history indicates that RFRA may have extraterritorial scope. *See* 146 Cong. Rec. S7991 (Sept. 5, 2000) (statement of Sen. Thurmond). We do not reach this question because we conclude that the plaintiffs are not "person[s]" within the meaning of RFRA.

[20] The district court rejected the defendants' qualified immunity from the RFRA claim, concluding that the plaintiffs' allegations made out a claim under RFRA, 433 F. Supp. 2d at 68, and that the plaintiffs' rights under RFRA were clearly established at the time of the alleged violations, *id.* at 71. Both the Supreme Court and our court have recognized qualified immunity is available to counter not only constitutional claims but also certain statutory claims. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known.") (emphasis added); *Berry v. Funk*, 146 F.3d 1003, 1014 (D.C. Cir. 1998) ("[W]e [have] held that . . . the doctrine of qualified immunity applied to plaintiff's statutory claims [under the

We must first determine whether the district court correctly treated the plaintiffs as "person[s]" under RFRA. Although we ordinarily "first look to the language of the law itself to determine its meaning," *United Mine Workers v. Fed. Mine Safety & Health Rev. Comm'n*, 671 F.2d 615, 621 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 927 (1982), RFRA's text does not define "person." While the defendants do not dispute that "person" is a broad term that has been interpreted as including aliens, they point out that, under various constitutional provisions, "person" does not include a non-resident alien. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 265 (holding that "people" as used in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" and thus excludes alien located in Mexico); *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) ("person" under Fifth Amendment does not include "non-resident aliens who have insufficient contacts with the United States"); *People's Mojahedin Org.*, 182 F.3d at 22 ("person" under Fifth Amendment does not apply to "foreign entity without property or presence in this country").

Federal Wiretap Act] in the same manner as it applied to plaintiff's constitutional claims."); *Tapley v. Collin*, 211 F.3d 1210, 1214 15 n.9 (11th Cir. 2000) (explaining that qualified immunity is available against statutory claim unless "Congress intended to abrogate the defense of qualified immunity to claims under that act" and listing statutes under which qualified immunity is available as defense). We do not reach the issue of the availability of qualified immunity from a RFRA claim.

Because RFRA prohibits the Government from "substantially burden[ing] a *person's* exercise of religion" instead of simply the exercise of religion, 42 U.S.C. § 2000bb-1(a) (emphasis added), we must construe "person" as qualifying "exercise of religion." The original version of RFRA had defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (1994). Indeed, the stated purpose of RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). In both *Sherbert* and *Yoder*, the Supreme Court had held that the Government must demonstrate a compelling interest to justify a substantial burden on religious exercise. *Sherbert*, 374 U.S. at 406-07 (holding that South Carolina had to demonstrate compelling state interest to justify unemployment compensation statute that denied benefits unless claimant worked on Saturday in contravention of her religious beliefs); *Yoder*, 406 U.S. at 215, 220-21 (holding that Wisconsin had to demonstrate compelling state interest to justify education statute requiring Amish children to attend formal high school in contravention of their religious beliefs). In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), however, the Court subsequently held that a generally applicable law may abridge religious exercise regardless whether the Government demonstrates a compelling interest therefor. *See id.* at 884-85 ("Even if we were inclined to breathe into [*Sherbert's* compelling interest test] some life beyond

the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense." (internal quotation and citation omitted)). RFRA was then enacted to restore the pre-*Smith* compelling interest test.[21] Accordingly, RFRA as originally enacted did not expand the scope of the exercise of religion beyond that encompassed by the First Amendment.[22]

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[21] The Congress declared that "in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," 42 U.S.C. § 2000bb(a)(4); by enacting RFRA it thus intended to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1).

[22] The plaintiffs and one group of Amici contend that RFRA was also enacted to extend the First Amendment Rights of prisoners and members of the military. Amicus Curiae The Baptist Joint Committee for Religious Liberty et al. (Amici) Br. 8-11. Before RFRA a prisoner's free exercise claim was reviewed under the rational basis standard, *see O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (upholding prison policy not to excuse inmate from work to attend worship service on rational basis review), and the military was exempt from some of the restrictions of the free exercise clause. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (*superseded by* 10 U.S.C. § 774) (sustaining military's dress regulations that forbade wearing of yarmulke because review of military regulations "is far more deferential" than compelling interest test used for review of "similar laws or regulations designed for civilian

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that RFRA could not be made applicable to the states under section five of the Fourteenth Amendment. Therefore, the Court determined that RFRA did not preclude municipal authorities from enacting an ordinance governing historic preservation that prevented a Catholic church from expanding. *Id.* at 511. In response, in 2000 the Congress amended RFRA through the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-274, 114 Stat. 803 (2000) (RLUIPA) (codified at 42 U.S.C. §§ 2000cc *et seq.*). RLUIPA provided that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" unless the government demonstrates a compelling interest therefor. 42 U.S.C. § 2000cc(a)(1).

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society"). Amici contend that RFRA changed the standard of review for the free exercise claims of prisoners and military service members to the compelling interest standard. Amici Br. 8-10 (citing H.R. Rep. No. 103-88 (1993) ("Pursuant to the Religious Freedom Restoration Act, the courts must review claims of prisoners and military personnel under the compelling governmental interest test."); S. Rep. No. 103-111 (1993) ("The intent of the Act is to restore traditional protection afforded to prisoner's claims prior to *O'Lone*."); S. Rep. No. 103-111 (1993) ("Under the unitary standard set forth in the act, courts will review the free exercise claims of military personnel under the compelling governmental interest test.")). Assuming *arguendo* the plaintiffs and the amici are correct—an issue we need not reach—the inclusion of prisoners and members of the military within RFRA's protection does not affect our resolution of the plaintiffs' RFRA claim.

RLUIPA also amended RFRA by altering the definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5 (incorporated by reference by 42 U.S.C. § 2000bb-2(4)). Rather than expanding the scope of protected religious exercise under RFRA, however, the change in the definition of "exercise of religion" merely affirmed that the Congress did not intend RFRA to overrule *Smith* in its entirety. Before *Smith*, the Supreme Court had held that the "free exercise inquiry asks whether government has placed a substantial burden on the observation of a *central* religious belief or practice." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (emphasis added); *see also Yoder*, 406 U.S. at 234 (noting Court's "consistent emphasis on the *central* values underlying Religion Clauses") (emphasis added). The Court similarly considered whether conduct was "*mandated by religious belief*" in deciding whether the Government had unconstitutionally burdened a plaintiff's free expression. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (quoting *Thomas v. Rev. Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981) (emphasis in original)).

In *Smith*, the Court also rejected applying the compelling interest standard "only when the conduct prohibited is 'central' to the individual's religion," declaring that "[i]t is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the

'compelling interest' test in the free speech field . . . . As we reaffirmed only last Term, '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'" 494 U.S. at 886-87 (alteration in *Smith*) (quoting *Hernandez*, 490 U.S. at 699). When the Congress enacted RFRA to overrule *Smith*, some courts interpreted RFRA as having restored not only the compelling interest standard but also the centrality limitation. *See, e.g.*, *Mack v. O'Leary*, 80 F.3d 1175, 1178-79 (7th Cir. 1996) (collecting cases). RLUIPA's definition of "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" made clear that centrality was not required. RFRA, then, both as originally enacted and as amended by RLUIPA in 2000, was not intended to expand the scope of free exercise of religion beyond that protected by the First Amendment pre-*Smith*.

Because RFRA's purpose was thus to restore what, in the Congress's view, is the free exercise of religion guaranteed by the Constitution, "person" as used in RFRA should be interpreted as it is in constitutional provisions. *Cf. Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-316 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.'" (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972))); *United States v. Ursery*, 518 U.S. 267, 304-05 (1996) ("[T]he Double Jeopardy Clause is part of the same Amendment as the Self-Incrimination Clause, and ought to be interpreted *in pari*

materia."). Construing "person" as used in the Fifth Amendment,[23] the Supreme Court held almost sixty years ago that German nationals who were convicted of war crimes and held at a U.S. army base in Germany were not "persons" under the Fifth Amendment and rejected the notion "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses." *Johnson v. Eisentrager*, 339 U.S. at 783.[24] More recently, the Supreme Court held that "people" as used in the Fourth Amendment[25] does not include non-resident aliens. In *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment did not apply to the DEA's search and seizure of an alien's Mexican residence. 494 U.S. 259, 269 (1990). Citing *Eisentrager*'s "rejection of extraterritorial application

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[23] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

[24] The Supreme Court reversed this Court's opinion in *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), which had given an expansive interpretation to "person." *See id.* at 963. Our concurring colleague believes that "nowhere [in *Eisentrager*] did the Court rely on the definition of 'person.'" Concurrence at 6. But the Supreme Court rejected a broad definition of "person" in no uncertain terms. *See Eisentrager*, 339 U.S. at 783; *see also id.* ("American citizens conscripted into the military service are . . . stripped of their Fifth Amendment rights . . . . Can there be any doubt that our foes would also have been excepted, but for the assumption 'any person' would never be read to include those in arms against us?").

[25] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

of the Fifth Amendment," the Court explained that "[i]f such is true of the Fifth Amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the Fourth Amendment, which applies only to 'the people.'" *Id*; *see also Boumediene*, 476 F.3d at 991-92 (finding it "'well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders.'" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)).

We believe that RFRA's use of "person" should be interpreted consistently with the Supreme Court's interpretation of "person" in the Fifth Amendment and "people" in the Fourth Amendment to exclude non-resident aliens. Because the plaintiffs are aliens and were located outside sovereign United States territory at the time their alleged RFRA claim arose,[26] they do not fall with the definition of "person." Accordingly, the district court erred in denying the defendants' motion to dismiss the plaintiffs' RFRA claim.

For the foregoing reasons, we affirm the district's court's dismissal of counts I, II, III, IV, V and VI of the plaintiffs' complaint and reverse the district court's denial of the defendants' motion to dismiss count VII thereof.

So ordered.

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[26] *See supra* note 18.

BROWN, *Circuit Judge*, concurring: I join Parts I, II–A and II–B of the opinion. I write separately because I believe special factors foreclose plaintiffs from bringing a *Bivens* action and because I disagree that the term "person" limits the scope of the Religious Freedom Restoration Act ("RFRA").

I

Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a federal court can only fashion a damages action for constitutional violations where no "special factors counsel[ ] hesitation" in doing so. *Chappell v. Wallace*, 462 U.S. 296, 298 (1983) (quoting *Bivens*, 403 U.S. at 396). Those factors do not relate to "the merits of the particular remedy" being sought, but involve "the question of who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). In cases where these special factors exist, we do not reach the underlying merits of plaintiffs' claims because we simply decline to usurp Congress's authority to create damages actions. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2608 (2007) (because *Bivens* does not give plaintiff a cause of action, "there is no reason to enquire further into the merits of [plaintiff's] claim or the asserted defense of qualified immunity"); *Lucas*, 462 U.S. at 390; *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (because special factors foreclose a *Bivens* action, "[w]e do not reach the question whether the protections of the Constitution extend to noncitizens abroad"). Unfortunately, the majority ignores this important separation-of-powers principle and focuses entirely on whether plaintiffs'

constitutional claims are meritorious. *See* maj. op. 28–35.[1]

2

While the Supreme Court has created *Bivens* remedies for traditional Fifth and Eighth Amendment claims, it has "consistently refused to extend *Bivens* liability to *any new context or new category of defendants*." *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68–69 (2001) (emphasis added). For example, in *United States v. Stanley*, 483 U.S. 669 (1987), the Court held that a former serviceman could not bring a Fifth Amendment claim against unknown federal officers for secretly giving him LSD. In reaching this conclusion, it explained that Congress's failure to provide adequate alternative remedies is "irrelevant" where "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Id.* at 683.

Applying the special factors inquiry to this case is particularly straightforward because of this court's decision in *Sanchez-Espinoza*. In that case, we refused to create a *Bivens* action for Nicaraguans who brought claims against U.S. government officials for supporting the Contras. As then-Judge Scalia explained:

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[1] Nothing in the majority's opinion forecloses the special factors argument. If the Supreme Court limits or overturns this court's constitutional holding in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007), future defendants should not hesitate to raise this argument.

> [T]he special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored—their ability to produce what the Supreme Court has called in another context *"embarrassment of our government abroad"* through *"multifarious pronouncements by various departments on one question."* *Baker v. Carr*, 369 U.S. 186, 226 (1962). Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens' using the courts in situations such as this to *obstruct the foreign policy of our government* is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

770 F.2d at 209 (emphasis added). The present case involves the method of detaining and interrogating alleged enemy combatants during a war—a matter with grave national security implications. Permitting damages suits by detainees may allow our enemies to "obstruct the foreign policy of our government." Moreover, dealing with foreign relations is primarily delegated to the executive and legislative branches, *see* U.S. CONST. art. I, § 8, cls.

11–16; *id.* art. II, § 2, and creating a damages action could produce "multifarious pronouncements by various departments." Nor does our government's unanimous condemnation of torture answer this concern, since where to draw that line is the subject of acrimonious debate between the executive and legislative branches. Treatment of detainees is inexorably linked to our effort to prevail in the terrorists' war against us, including our ability to work with foreign governments in capturing and detaining known and potential terrorists. Judicial involvement in this delicate area could undermine these military and diplomatic efforts and lead to "embarrassment of our government abroad." Accordingly, all of the special factors we identified in *Sanchez-Espinoza* apply to this case and plaintiffs cannot bring their claims under *Bivens*.

II

A

The majority holds plaintiffs cannot bring a RFRA claim because they are not "person[s]" within the meaning of that statute. Yet, "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). RFRA does not define "person," so we must look to the word's ordinary meaning. There is little mystery that a "person" is "an individual human being ... as distinguished from an animal or a thing." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1686 (1981). Unlike the majority, I believe Congress "[did not] specifically intend[ ] to vest the term 'persons' with a definition ... at odds with its plain meaning." *Rasul v. Rumsfeld,* 433 F. Supp. 2d 58, 67 (D.D.C. 2006).

The majority does not point to a single statute defining "person" so narrowly as to exclude nonresident aliens from its ambit, and nothing in RFRA's history suggests Congress focused on the term's scope here. RFRA originally provided that "[g]overnment shall not substantially burden a *person's exercise of religion*" unless such a burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1 (1994) (emphasis added). It defined "exercise of religion" as "the exercise of religion *under the First Amendment* to the Constitution." *Id.* § 2000bb-2(4) (emphasis added). The reference to the

"First Amendment" made it clear that persons who did not have First Amendment rights were not protected by RFRA. Given this clear textual basis, the term "person" did no work as a limiting principle—"First Amendment" did the job.

In the Religious Land Use and Institutionalized Persons Act ("RLUIPA") of 2000, Pub. L. No. 106-274, 114 Stat. 803, Congress amended RFRA's definition of "exercise of religion" to cover "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and removed the term "First Amendment." *See id.* §§ 7(a), 8(7)(A), 114 Stat. 806, 807. This change was meant to "clarify[ ] issues that had generated litigation under RFRA" by providing that "[r]eligious exercise need not be compulsory or central to the claimant's religious belief system." H.R. REP. NO. 106-219, at 30 (1999); *see also Adkins v. Kaspar*, 393 F.3d 559, 567–68 & n.34 (5th Cir. 2004) (citing pre-RLUIPA cases requiring "the religious exercise burdened to be 'central' to the religion"). Congress wanted to expand RFRA's protections to a broader range of religious practices, *see Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1033 (9th Cir. 2007); there is no indication it wanted to broaden the universe of persons protected by RFRA. However, by removing the term "First Amendment" from RFRA, Congress inadvertently deleted the textual hook precluding persons who did not have First Amendment rights from asserting RFRA claims.

The panel majority attempts to cure the problem created by Congress's careless amendment by constricting the meaning of the term "person." This boils down to a claim that, by removing the term "First Amendment" from RFRA's definition of "exercise of religion," Congress *sub silentio* changed RFRA's definition of "person." But this transforms statutory interpretation into a game of whack-a-mole: a deleted textual hook does not simply re-appear in another statutory term.

Finding no other support for its constricted definition of "person," the majority turns to decisions interpreting constitutional provisions: *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Fifth Amendment), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment). *Eisentrager* rejected this circuit's conclusion that the breadth of the term "person" in the Fifth Amendment expanded the coverage of the Due Process Clause beyond its traditional limits. Nevertheless, nowhere in its extensive discussion did the Court rely on the definition of "person."[2] Its holding turned on the conventional understanding of the Fifth Amendment, the "full text" of that Amendment, and

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[2] Similarly, none of the other Fifth Amendment cases the majority cites rely on the definition of "person." *See Jifry v. FAA*, 370 F.3d 1174, 1182–83 (D.C. Cir. 2004) (not mentioning the term "person" in holding nonresident aliens with insufficient contacts do not have Fifth Amendment rights); *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (same for foreign entities).

the foreign policy complexities of allowing aliens to assert constitutional rights. *Id.* at 782–83.[3] Moreover, *Eisentrager* interpreted the Due Process Clause; RFRA implements the Free Exercise Clause. The term "person" does not appear in the Free Exercise Clause, *see* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... ."), and thus the definition of "person" cannot be the reason aliens held abroad do not have free exercise rights, *see Boumediene*, 476 F.3d at 993 (implying Guantanamo detainees do not have First Amendment rights even though "[t]he First Amendment's guarantees of freedom of speech and free exercise of religion do not mention individuals").

Verdugo is even less helpful to the majority. Unlike *Eisentrager*, *Verdugo* did rely on a definitional analysis, explaining that the Fourth Amendment did not apply to nonresident aliens outside of our borders, in part, because "the people" referred to in the Amendment identifies a "*class of persons* who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265 (emphasis added). While "the people" are merely a "class of persons," the relevant inquiry for RFRA purposes is "who are

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[3] In fact, the *Eisentrager* Court repeatedly used the term "person" in its common meaning. *See id.* at 768 n.1 (citing cases brought on behalf of "persons," referring to "German enemy aliens"); *id.* at 783 ("The Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons ....").

'persons'?" The answer is obvious— "persons" are individual human beings, of whom the American people are just one class.

B

While the majority's approach is untenable, the plaintiffs still do not prevail. RFRA's proscription that "[g]overnment shall not substantially burden a person's exercise of religion" and RLUIPA's new definition of "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," leave no textual basis for prohibiting suits brought by non-resident aliens held at Guantanamo, or foreign nationals who work for American officials on NATO military bases, or, arguably, jihadists our soldiers encounter on foreign battlefields.[4] While "statutory language represents the clearest indication of Congressional intent," we may go beyond the text in those "rare cases" where a party can show that "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Nat'l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (internal quotation omitted).

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[4] The term "government" provides no limiting basis since RFRA defines this term as including an "official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1). Defendants, the Secretary of Defense and highranking military officers, are unquestionably officials of the United States. Moreover, as the majority points out, since defendants are officials of the United States, it is irrelevant whether Guantanamo Bay Naval Base is a "covered entity." Maj. op. 35 n. 19.

The unusual drafting history of RFRA and RLUIPA make this one of those rare cases. RFRA originally only provided for suits for violation of First Amendment rights, which did not include intrusions on the free exercise of those in plaintiffs' position. *See Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995). There is no doubt that RLUIPA's drafters, in changing the definition of "exercise of religion," wanted to broaden the scope of the kinds of practices protected by RFRA, not to increase the universe of individuals protected by RFRA. *See* H.R. REP. NO. 106-219, at 30; *Adkins*, 393 F.3d at 567–68 & n.34; *Navajo Nation*, 479 F.3d at 1033. Literal application of RFRA would force us to hold Congress's careless drafting inadvertently expanded the scope of RFRA plaintiffs. Such a result is "demonstrably at odds with the intentions of [RLUIPA's] drafters." *See Nat'l Pub. Radio*, 254 F.3d at 230.

Even if I believed RLUIPA expanded the scope of persons protected by RFRA, I would have no trouble concluding defendants are protected by qualified immunity.[5] There was strong reason for defendants to believe RFRA originally did not apply to plaintiffs. While RLUIPA changed RFRA, it was

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[5] There is some uncertainly about whether qualified immunity is available to federal officials sued under RFRA. *See Kwai Fun Wong v. United States*, 373 F.3d 952, 977 (9th Cir. 2004) ("Neither this court nor any other court of appeals has decided whether qualified immunity is available to a federal government official sued under RFRA."). In this case, however, Plaintiffs have assumed that qualified immunity is available and have thus waived any argument to the contrary.

far from clearly established that this change expanded the class of persons protected by RFRA.

C

Accepting plaintiffs' argument that RFRA imports the entire Free Exercise Clause edifice into the military detention context would revolutionize the treatment of captured combatants in a way Congress did not contemplate. Yet, the majority's approach is not much better. It leaves us with the unfortunate and quite dubious distinction of being the only court to declare those held at Guantanamo are not "person[s]." This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human.

In drafting RFRA, Congress was not focused on how to accommodate the important values of religious toleration in the military detention setting. If Congress had focused specifically on this challenge, it would undoubtably have struck a different balance: somewhere between making government officials' pocketbooks available to every detainee not afforded the full panoply of free exercise rights and declaring those in our custody are not "persons." It would not have created a RFRA-like damage remedy, but it likely would have prohibited, subject to appropriate exceptions, unnecessarily degrading acts of religious humiliation. It would have sought to deter such acts not by compensating the victims, but by punishing the perpetrators or through other administrative measures. *See, e.g.*, Ronald W. Reagan National Defense Authorization

Act for Fiscal Year 2005, Pub. L. No. 108-375, §§ 1091 to 1092, 118 Stat. 1811, 2068–71 (2004) (to be codified at 10 U.S.C. § 801 note) (creating an administrative regime to prevent unlawful treatment of detainees); Detainee Treatment Act of 2005, Pub. L. 109-148, § 1003(a), 119 Stat. 2739 (to be codified at 42 U.S.C. § 2000dd) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."). Judicial interpretation without text is at best a stop-gap; at worst, a usurpation. In 2000, when Congress amended RFRA, jihad was not a prominent part of our vocabulary and prolonged military detentions of alleged enemy combatants were not part of our consciousness. They are now. Congress should revisit RFRA with these circumstances in mind.

APPENDIX C - ENTERED July 20, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL *et al.*,

Plaintiffs,

v.

DONALD RUMSFELD *et al.*,

Defendants.

Civil Action No: 04-1864 (RMU)

FINAL JUDGMENT

In accordance with the order of this Court dated July 10, 2006, it is hereby ordered that Counts I-VI of the plaintiffs' complaint are dismissed for the reasons states in the court's Memorandum Opinion [23] February 6, 2006.

Nancy Mayer-Whittington, Clerk

By /s/_____
Deputy Clerk

By Direction of

RICARDO M. URBINA
U.S. District Court Judge

APPENDIX D - ENTERED JULY 20, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
DONALD RUMSFELD *et al.*,	:	
	:	
Defendants.	:	

Civil Action No.: 04-1864 (RMU)
Document No.: 32

ORDER

Currently before the court is the plaintiffs' unopposed motion for entry of final judgment pursuant to Fed. R. Civ. P. 54(b) and the supporting memorandum of law. Because the court finds that there is no just reason to delay the entry of final judgment as to Counts I-VI of the complaint, it is hereby this 10th day of July, 2006

ORDERED that the Plaintiffs' motion is **GRANTED**.

Accordingly, the Clerk of Court is hereby directed to enter final judgment dismissing Counts I-VI of plaintiffs' complaint for the reasons stated in

the court's memorandum opinion on February 6, 2006.

RICARDO M. URBINA
United States District Judge

APPENDIX E - ENTERED May 8, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
DONALD RUMSFELD *et al.*,	:	
	:	
Defendants.	:	

Civil Action No.: 04-1864 (RMU)
Document No.: 8

ORDER

DENYING THE DEFENDANTS' MOTION TO DISMISS THE RELIGIOUS FREEDOM RESTORATION ACT CLAIM

For the reasons stated in the Memorandum Opinion contemporaneously filed herewith, it is this 8th day of May, 2006,

ORDERED that the defendants' motion to dismiss the plaintiffs' Religious Freedom Restoration Act Claim is **DENIED**.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL *et al.*, :
:
Plaintiffs, :
:
v. :
:
DONALD RUMSFELD *et al.*, :
:
Defendants. :

Civil Action No.: 04-1864 (RMU)
Document No. 8

MEMORANDUM OPINION

DENYING THE DEFENDANTS' MOTION TO DISMISS THE RELIGIOUS FREEDOM RESTORATION ACT CLAIM

I. INTRODUCTION

The plaintiffs, former detainees at the United States Naval Station at Guantanamo Bay, Cuba ("GTMO" or "Guantanamo"), allege that the defendants engaged in depraved acts, which violated their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq*. Specifically, the plaintiffs assert various encroachments upon their religious liberties, including harassment in the practice of their religion, forced shaving of their religious beards and placing the Koran in the toilet. Currently before the court is the defendants' motion to dismiss the plaintiffs' RFRA claim for failure to

state a claim and because the defendants are entitled to qualified immunity. Because RFRA applies to government action in GTMO, and because the plaintiffs allege acts which substantially burden their religious exercise, the plaintiffs succeed in pleading a viable cause of action. Furthermore, because the defendants' alleged actions violate rights clearly established at the time the defendants allegedly committed them, they are not entitled to any qualified immunity. For these reasons, the court denies their motion to dismiss the plaintiffs' RFRA claim.

II. BACKGROUND

A. Factual Background

The plaintiffs allege the following:

In the months immediately following the September 11 attacks on America, the plaintiffs, all citizens of the United Kingdom, were conducting humanitarian relief in Afghanistan and were trying to return to England. Compl. ¶¶ 2-3, 35. On November 28, 2001, an Uzbek warlord, General Rashid Dostum, captured three of the plaintiffs – Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed. *Id.* ¶ 2. One month later, General Dostum handed them over to the United States for a bounty. *Id.* ¶¶ 2, 42-44. After two weeks of suffering extensive abuse and interrogations under United States' custody, the military transported Rasul and Iqbal from Afghanistan to GTMO. *Id.* ¶¶ 37-64. Ahmed, however, stayed in Afghanistan for six weeks under United States custody, eventually succumbing to pervasive interrogation techniques and falsely

confessing to having ties with Al Qaeda. *Id.* ¶ 62. Only then, in February 2002, did the United States transport Ahmed to Guantanamo. *Id.* ¶ 63.

The Taliban captured the fourth plaintiff, Jamal Al-Harith, in Afghanistan. *Id.* ¶ 3. The Taliban accused Al-Harith of spying for the British government and tortured him. *Id.* When the Taliban fell, Al-Harith was released and immediately contacted the British embassy officials to coordinate his evacuation. *Id.* After a month of coordinating with British officials, United States forces detained him and, in February of 2002, transported him to GTMO. *Id.* ¶¶ 3-4, 63.

Shortly before the plaintiffs' arrival in Guantanamo Bay in December 2002, defendant Donald Rumsfeld signed a memorandum approving more aggressive interrogation techniques that allegedly departed from the standards of care normally afforded military prisoners. *Id.* ¶ 9. Some of these previously prohibited techniques includes forcing the prisoners to endure stresspositions for up to four consecutive hours, disrobing prisoners, intimidating prisoners with dogs, twenty-hour interrogation sessions, forcing prisoners to wear hoods, shaving their hair, isolating the prisoners in total darkness and silence, and using physical contact. *Id.* In April 2003, Rumsfeld withdrew approval of these tactics. *Id.* ¶¶ 10-11.

The plaintiffs further allege that:

Following this revocation, the detainees at GTMO continued to suffer from inhumane

treatment. *Id.* ¶¶ 65-158. During the United States' detainment of the plaintiffs at GTMO, which has lasted over two years, the plaintiffs suffered repeated beatings and forced body cavity searches. *Id.* ¶¶ 4, 6. Furthermore, prison guards frequently shackled the plaintiffs for many hours, causing wounds and permanent scarring, forced them to remain in stressful positions for hours, injected unknown substances into their bodies, and required them to live in cramped cages without protection from the elements. *Id.* ¶¶ 6, 70, 72, 85. In addition, the guards deprived the plaintiffs of adequate food, sleep, and communication with family members. *Id.* ¶ 6. The guards also humiliated and harassed the plaintiffs as they tried to practice their religion. *Id.* After months of extreme hardship and relentless interrogations, Rasul and Iqbal relented and confessed (falsely) to having ties with Al Qaeda. *Id.* ¶¶ 110, 127. Despite their confessions, after more than two years in United States custody without having any charges brought against them, in March of 2004, the United States released all of the plaintiffs, and they returned to their homes in the United Kingdom. *Id.* ¶ 137.

B. Procedural Background

The plaintiffs filed the instant case against various military officials on October 27, 2004.[1] On March 16, 2005, the defendants filed a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

On February 6, 2006, this court issued a memorandum opinion dismissing the plaintiffs' international law claims and the plaintiffs' constitutional claims. Mem. Op. (Feb. 6. 2006). The court ruled that because the plaintiffs had not exhausted their administrative remedies by bringing their international law claims to an appropriate Federal agency, the plaintiffs' international law claims were not ripe. *Id.* As to the plaintiffs'

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[1] The defendants are Donald Rumsfeld, Secretary 1 of Defense; Air Force General Richard Myers, Former Chairman of the Joint Chiefs of Staff; Air Army Major General Geoffrey Miller, Former Commander of the Joint Task Force at Guantanamo Bay Naval Base; Army General James Hill, Commander of the United States Southern Command; Army Major General Michael Dunlavey, Former Commander of the Joint Task Force at Guantanamo Bay Naval Base; Army Brigadier General Jay Hood, Commander of the Joint Task Force at Guantanamo Bay Naval Base; Marine Brigadier General Michael Lehnert, Commander of the Joint Task Force-160 at Guantanamo Bay Naval Base; Army Colonel Nelson Cannon, Commander at Camp Delta at Guantanamo Bay Naval Base; Army Colonel Terry Carrico, Commander of Camp X-Ray-Camp Delta at Guantanamo Bay Naval Base; Army Lieutenant Colonel William Cline, Commander of Camp Delta at Guantanamo Bay Naval Base; Army Lieutenant Colonel Diane Beaver, Legal Advisor to General Dunlevey; and John Does 1-100. *See* Compl.

constitutional law claims, the court ruled that the defendants are entitled to qualified immunity. *Id.* The court deferred ruling on the defendants' motion to dismiss the plaintiffs' RFRA claims pending further briefing by the parties. *Id.* Having received supplemental briefing from the parties, the court turns now to the merits of that motion.

III. ANALYSIS

A. Legal Standard for a 12(b)(1) Motion to Dismiss

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C. Cir. 2004) (noting that "[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction").

Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. Dist. of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ir., Ltd. v Compagnie des Bauxite de Guinea*, 456 U.S. 694, 702 (1982)). On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 561 (1992). The court may dismiss a complaint for lack of subject-matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Because subject-matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

B. Legal Standard for a 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040

(D.C. Cir. 2003) (citing FED R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 511-14 (2002), or "plead law or match facts to every element of a legal theory," *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal quotation marks and citation omitted).

Accordingly, "the accepted rule in every type of case" is that a court should not dismiss a complaint for failure to state a claim unless the defendant can show beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Warren v. Dist. of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004); *Kingman Park*, 348 F.3d at 1040. Thus, in resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations – including mixed questions of law and fact – as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning*, 292 F.3d at 242. While many well-pleaded complaints are conclusory, the court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual

allegations. *Warren*, 353 F.3d at 39; *Browning*, 292 F.3d at 242.

C. The Court Denies the Defendants' Motion to Dismiss the Plaintiffs' RFRA Claim

1. RFRA Applies to Government Action in GTMO

The defendants argue that RFRA does not apply extraterritorially, specifically, to the U.S. Naval Base at Guantanamo Bay, Cuba. Defs.' Mot. to Dismiss ("Defs.' Mot.") at 24-27. The defendants argue that Congress intended for RFRA to apply only to government action in the continental United States. *Id.* at 24-25 (indicating that Congress' sole intent in creating RFRA was to undo the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1989), a case involving the application of Oregon drug laws to the ingestion of peyote in religious rites and having no natural extraterritorial application); Defs.' Supplemental. Mem. of P. & A. in Supp. of Defs.' Mot. ("Defs.' Supp.") at 6-7; Defs.' Reply to Pls.' Supplemental. Mem. of P. & A. in Opp'n to Defs.' Mot. ("Defs.' Reply") at 3-4. The plaintiffs argue that because RFRA applies in "each territory and possession of the United States," 42 U.S.C. § 2000bb-2(2), the plain language of the statute extends its application extraterritorially, including GTMO. Pls.' Brief in Supp. of their Claims Pursuant to RFRA ("Pls.' Supp.") at 2-8.

Under RFRA, "the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general

applicability." 42 U.S.C. § 2000bb-1(a). The government may burden a person's exercise of religion, however, if the government action "is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). RFRA defines the government to include, *inter alia*, covered entities. 42 U.S.C. § 2000bb-2(1). In turn, covered entities means "the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States." *Id.* § 2000bb-2(2). To determine whether the term "covered entities" includes GTMO, the court must engage in statutory interpretation. Although the defendants argue that RFRA applies only in the continental United States, that reading of the statute makes little sense.

Statutory interpretation always begins, although it does not always end, with the language of the statute. *Guam Indus. Serv., Inc. v. Rumsfeld,* 383 F. Supp. 2d 112, 116 (D.D.C. 2005) (citing *In Re England*, 375 F.3d 1169, 1178 (D.C. Cir. 2004)); *see also Bedroc Ltd. v. United States,* 541 U.S. 176, 183 (2004) (stating that the court "begins with the statutory text, and ends there as well if the text is unambiguous"). "Before resorting to legislative history, a court . . . should first look to the language of the law itself to determine its meaning." *United Mine Workers v. Fed. Mine Safety and Health Review Comm'cn*, 671 F.2d 615, 621 (D.C. Cir. 1982).

The government urges the court to apply RFRA solely to the continental United States. Defs.' Mot. at 26 (arguing that there "is a strong

presumption that federal statutory law does 'not have extraterritorial application,' and that presumption may be rebutted only when a contrary 'intent is clearly manifested'") (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993)). The court can fathom no greater manifestation of Congress' intent then the plain text of the statute. *Bedrock Ltd.*, 541 U.S. at 183.

RFRA defines the term "government" to include, "a branch, department, agency, instrumentality, and official . . . of the United States, or a covered entity." 42 U.S.C. § 2000bb-2(1). In essence, this provision reaffirms RFRA's application to United States governmental action.[2] *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (citing § 2000bb-3(a) in recognizing RFRA's "universal coverage" to all Federal law and the "implementation of that law"). Geographically,

[2] RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a).

RFRA extends to "each territory and possession of the United States."[3] *Id.* Because RFRA applies to U.S. government action in the continental United States via § 2000bb-2(1) and § 2000bb-3(a), the defendants' call for the court to construe territory and possession to mean the continental United States renders that phrase meaningless. *Murphy Exploration and Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 481 (D.C. Cir. 2001) (stating that "when 'construing a statute we are obliged to give effect, if possible, to every word Congress used'") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Indeed, the defendants cite no case law construing the term "territory and possession of the United States" in the fashion they now advocate. Accordingly, the court rules that RFRA applies in U.S. territories and possessions – areas outside of the continental United States. *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002) (ruling that RFRA applies in federal instrumentalities, in that case, Guam). The court must now determine whether RFRA's coverage includes the Naval Base at

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[3] The defendants actually argue that RFRA may not apply to federal territories and possessions. Defs.' Supp. at 4, n.3. The defendants incorrectly look to *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 n.2 (2005) to support their contention. In *Cutter*, the Supreme Court recognized that it has not yet had occasion to rule on whether RFRA remains operative upon the Federal government after *City of Boerne v. Flores*, 521 U.S. 507, 515-516 (1997). *Cutter*, 125 S. Ct. at 2118 n.2. The D.C. Circuit, however, answered this question in the affirmative. *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001). Because RFRA is alive and well, the defendants' argument that it may not apply to territories and possessions of the United States, despite the statute's express application to those areas, 42 U.S.C. § 2000bb-2(2), borders on the laughable.

Guantanamo Bay. To answer this question, the court must consider the nature and status of GTMO.

Twice previously the Supreme Court considered and expressed its opinions on the status of the Naval Base at Guantanamo Bay. First, the Supreme Court considered whether the Fair Labor Standards Act, 29 U.S.C. § 201, applied in a leasehold of the United States, located on the Crown Colony of Bermuda. *Vermilya-Brown v. Connell*, 335 U.S. 377, 378 (1948). In its analysis, the Court likened the Crown Colony of Bermuda to GTMO. *Id.* at 383-85. The Court cited the provisions of the United States' lease agreement for GTMO from Cuba, which, although recognizing "the continuance of the ultimate sovereignty of the Republic of Cuba over [GTMO]," also stated that "the United States shall exercise complete jurisdiction and control over and within said areas." *Id.* at 385 n.5. The Supreme Court ruled that, under the Defense Base Act, 42 U.S.C. § 1651 (1942), Guantanamo Bay constituted a possession of the United States. *Id.* at 389. According to the Defense Base Act, GTMO is a "[t]erritory or possession outside the continental United States." 42 U.S.C. § 1651. The Court's analysis in *Vermilya-Brown* is not directly binding in this case both because the Court was not concerned directly with GTMO but with Bermuda and because the Defense Base Act does not directly apply here.[4] Nevertheless, the Court's analysis informs the contours both of the phrase "territory and possession" and the nature of the United States' hold on GTMO.

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[4] The Defense Base Act specifically governs the scope of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

More recently, the Court directly considered the nature of GTMO in ascertaining the applicability of habeas challenges under 28 U.S.C. § 2241. *Rasul v. Bush*, 542 U.S. 466 (2004) (hereinafter "*Rasul I*"). Ruling that GTMO detainees can challenge their detention under 28 U.S.C. § 2241, the Court characterized GTMO as a "territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Id.* at 480 (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418 (hereinafter "Lease Agreement")). As in the present case, in *Rasul I*, the government urged the Supreme Court to adhere to the "'longstanding principle of American law' that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested." *Id.* at 480 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The Court, relying on the explicit terms of the United States' lease agreement for the Guantanamo Bay Naval Base, ruled that "[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no traction . . . with respect to persons

detained within the territorial jurisdiction of the United States."[5] *Id.* (noting that under the lease agreement, "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses") (quoting Lease Agreement).

In essence, the United States exercises perhaps as much control as it possibly could short of "ultimate sovereignty" over GTMO.[6] *Id.* at 475. As stated above, RFRA applies to "each territory and possession of the United States." 42 U.S.C. § 2000bb-

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[5] The defendants remind the court that the presumption against extraterritorial application of statutes "has 'special force when [courts] are construing . . . provisions that may involve foreign and military affairs for which the President has unique responsibility.'" Defs.' Mot. to Dismiss ("Defs.' Mot.") at 26 (quoting *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (modifications in original). While the defendants are certainly correct in their legal proposition, this heightened presumption still is overcome by the fact that "Guantanamo Bay is in every practical respect a United States territory," that it "is far removed from any hostilities," and the fact that the GTMO lease "is no ordinary lease . . . [it] has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul v. Bush*, 542 U.S. 466, 487 (2004) ("*Rasul I*") (Kennedy, J., concurring) (indicating that the legal notion "that there is a legal realm of political authority over military affairs where the judicial power may not enter" does not apply "in light of the status of Guantanamo Bay").

[6] As Justice Scalia interpreted the majority's opinion in *Rasul I*, "not only § 2241 but presumably *all* United States law applies there – including, for example, the federal cause of action recognized in *Bivens*[.]" *Rasul I*, 542 U.S. at 500 (Scalia, J., dissenting) (emphasis in original).

1(2). If that language is to have any meaning, it must include lands such as GTMO, over which the United States exercises not some control or some jurisdiction, but "complete jurisdiction and control," i.e. "plenary and exclusive jurisdiction." *Rasul I* at 475, 480. The express terms of RFRA, the Lease Agreement, and the Supreme Court's characterization of GTMO in both *Vermilya-Brown* and *Rasul I* compel this result.

The defendants ask the court to look to the legislative history of RFRA in ascertaining its geographic reach. Defs.' Supp. at 6-7; Defs.' Reply at 4. The government's argument regarding legislative history is unconvincing for two reasons. First, the court will not look to legislative history to replace a plain reading of an unambiguous statutory provision. *Bedroc Ltd.,* 541 U.S. at 183. While the court may look to legislative history for assistance in interpreting ambiguous statutory terms, the court will not interpret words out of the statute, in place for what the government thinks Congress wanted. *United Mine Workers,* 671 F.2d at 621 (stating that "[c]ommittee reports, the statements of committee members, or other legislative materials . . . may not be used as a means for construing a statute contrary to its plain terms"). "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Bedroc Ltd.,* 541 U.S. at 183. Here, RFRA applies to U.S. territories and possessions and, as stated previously, an interpretation limiting RFRA solely to the continental United States would rob those terms of any meaning.

Second, even if the court were to delve into the murky waters of legislative history and peruse the congressional record, that history does not necessarily support the defendants' reading. True, Congress' purpose in creating RFRA was, in part, to restore free exercise law to its stead prior to *Employment Division v. Smith. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1216 (2006). Nevertheless, Congress' restorative motive does not lead inexorably to the conclusion that this constituted its sole purpose.[7] In fact, the plaintiffs brandish legislative history of their own suggesting a different congressional purpose from that espoused by the defendants. Pls.' Supp. at 9-10 (noting that Senator Strom Thurmond, in objecting to the 2000 amendment to RFRA, identified RFRA's application to soldiers stationed in Saudi Arabia and objected to the continued applicability of RFRA in that region) (citing 146 Cong. Rec. S7991, S7993). The plaintiffs' counter argument is compelling not because the court utilized this legislative history in interpreting the statute, but because it reaffirms the notion that selective citations to legislative history are wrought with speculation and akin to "looking over a crowd and picking out your friends." *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005)

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[7] 7 Indeed, the statute expressly indicates a dual purpose; (1) to restore the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder, and* (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb (b). The defendants' sidelong interpretation of the statute showcases the former at the expense of the latter.

(quoting Judge Harold Leventhal's memorable phrase as stated in Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)).

The defendants also argue that the Religious Freedom Restoration Act ("RFRA") does not apply to non-resident aliens. Defs.' Reply at 3. The defendants do not support their assertion with any case law. Contrary to the defendants' claim, RFRA expressly protects the religious exercise of "persons," a broadly applicable term, commonly including aliens. *E.g. U.S. v. Balsys*, 524 U.S. 666 (1998) (ruling that the term "persons" for purposes of the Fifth Amendment includes aliens); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (citing cases in which the Supreme Court held that aliens enjoy certain constitutional rights). The defendants contend that Congress may have lacked a specific intent to *include* aliens within the scope of RFRA's protection. Defs.' Reply at 3. Nevertheless, because RFRA explicitly applies to "persons," the defendants, at a bare minimum, must demonstrate that Congress specifically intended to vest the term "persons" with a definition different at odds with its plain meaning. *See Love v. Johanns*, 439 F.3d 723, 732 (D.C. Cir. 2006) (refusing a statutory construction that "is not a normal understanding of those words in the English language" and "that simply is not within the plain meaning of the statute"). But, the defendants cite no authority to support their construction of RFRA. The defendants are correct that constitutional protections and the laws of the United States do not automatically apply extraterritorially simply because an amendment

"speaks in the relatively universal term of 'person.'" *Verdugo-Urquidez*, 494 U.S. at 260, 269 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). But here, GTMO is a U.S. territory, and Congress has expressly extended RFRA to government action in each "territory and possession of the United States." 42 U.S.C. § 2000bb-2(2).

For these reasons, the court rules that RFRA applies to U.S. government action at the Naval Base in Guantanamo Bay.

2. The Defendants Are Not Entitled to Qualified Immunity

The defendants argue that even if RFRA applies in GTMO, that the defendants are entitled to qualified immunity because its application in GTMO was not clearly established at the time of the alleged conduct at issue in this case. Defs.' Supp. at 7. The court cannot agree.

a. Legal Standard for a Qualified Immunity

A plaintiff may bring a civil action for money damages against a federal official in his or her individual capacity for violation of the plaintiff's constitutional rights. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). Federal officials may be entitled to a defense of qualified immunity, however. *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity "shield[s officials] from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* It "provides not simply a defense to liability, but also an entitlement not to stand trial or face the other burdens of litigation." *Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

In evaluating a *Bivens* claim to which a defendant has raised the qualified immunity defense, the court must follow a two-pronged analysis. *Butera v. Dist. of Columbia*,[8] 235 F.3d 637, 646 (D.C. Cir. 2001) (citing *Wilson*, 526 U.S. at 609). First, as a threshold matter, the court must determine whether the plaintiff has alleged the deprivation of an actual constitutional right. *Id.*; *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In defining an "actual constitutional right," a court must be careful to avoid defining the right in overly general terms "lest [it] strip the qualified immunity defense of all meaning." *Butera*, 235 F.3d at 646. Instead, the court must identify the right with the appropriate level of specificity so as to allow officials to reasonably anticipate when their conduct may give rise to liability for damages. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

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[8] *Butera* involved a suit brought against state officials pursuant to 42 U.S.C. § 1983. *Butera v. Dist. of Columbia*, 235 F.3d 637, 640-41 (D.C. Cir. 2001). The Supreme Court has held, however, that there is no distinction between a *Bivens* suit and a suit brought under section 1983 for purposes of immunity. *Butz v. Economou*, 438 U.S. 478, 508 (1978); *Gray v. Poole*, 243 F.3d 572, 577 n.4 (D.C. Cir. 2001).

Second, the court must decide whether the constitutional right was clearly established at the time of the defendant's action. *Id.* A right is "clearly established" if "the contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Wilson*, 526 U.S. at 614-15); *see Crawford-El v. Britton*, 523 U.S. 574, 591 (1998) (stating that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct"). Although the specific action in question need not have been held unlawful by the courts, its unlawfulness in light of pre-existing law must have been apparent to the defendant. *Butera*, 235 F.3d at 646 (quoting *Anderson*, 483 U.S. at 640).

b. The Plaintiffs Allege a Clearly Established Statutory Right Under RFRA

Under *Bivens*, the two inquiries before the court are (1) whether the plaintiffs have alleged an actual statutory right under RFRA, that is, whether the actions alleged in the plaintiffs' complaint violate RFRA and, if so, (2) whether that right was clearly established at the time of the defendants' actions. *Butera*, 235 F.3d at 646. The court concludes that the plaintiffs have stated a claim under RFRA and that their rights under RFRA were clearly established at the time of the defendants' actions.

i. The Plaintiffs Have Stated a Claim under RFRA

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates a "compelling governmental interest" and uses the "least restrictive means" of furthering that interest.[9] 42 U.S.C. § 2000bb-1(a),(b); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 166-68 (D.C. Cir. 2003). To establish a prima facie case under RFRA, a plaintiff must show that the government action "has placed a substantial burden on the observation of a central religious belief or practice." *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (recognizing that "'substantial burden' in RFRA is what the Supreme Court had in mind in its pre-*Smith* opinion in *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-85 (1990)"). RFRA defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A), incorporated by 42 U.S.C. § 2000bb-2(4); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001). If government action creates a substantial burden, a court can still uphold the

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[9] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held RFRA unconstitutional as applied to state action. *Id.* at 514. However, "the portion of RFRA remaining after *City of Boerne* . . . the portion . . . applicable to the federal government . . . survived the Supreme Court's decision striking down the statute as applied to the States." *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001).

action if the defendant shows that the action serves a compelling government interest in the least restrictive manner possible. 42 U.S.C. § 2000bb-1(b); *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 38 (D.D.C. 2002).

Regarding the substantial burden prong, the plaintiffs allege, among other things, that the defendants harassed the plaintiffs in the practice of their religion, subjected them to forced shaving of their religious beards, and placed the Koran in the toilet.[10] Compl. ¶¶ 58, 78, 206. Flushing the Koran

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[10] The defendants contend that because the plaintiffs' claims do not arise from a facially neutral government policy, they do not fall within the scope of RFRA. Defs.' Supp. At 10 (citing *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122 (D.D.C. 2004)). In *Larsen*, this court considered allegations that the plaintiffs, non-liturgical Protestant ministers, were denied accession to the Navy Chaplain Corps because of "systematic and pervasive religious prejudice." *Id.* at 124. The court ruled that RFRA was inapplicable to the plaintiffs' claims because the plaintiffs were not challenging a neutral law of general applicability but rather, were "attacking what they consider to be an intentionally discriminatory policy." *Id.* at 138. The court's decision in *Larsen* was based on 42 U.S.C. § 2000bb(b)(1), which states that one purpose of RFRA was to "restore the compelling interest test" which applied to facially neutral laws prior to the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). 42 U.S.C. § 2000bb(b)(1). By contrast, the plaintiffs in this case state a cognizable claim under RFRA by alleging to be "persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). Unlike in *Larsen*, wherein the plaintiffs were challenging government policy, here, the plaintiffs are challenging government action. RFRA contemplates not simply protection from government policy and law, but also from government action. 42 U.S.C. § 2000bb-1(a) (stating that the "[g]overnment shall not substantially burden a person's exercise of religion *even if* the burden results from a rule of

down the toilet and forcing Muslims to shave their beards falls comfortably within the conduct prohibited from government action by RFRA. *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (identifying the RFRA concerns inherent in claims of grooming policies); *Diaz v. Collins*, 114 F.3d 69, 72-73 (5th Cir. 1997) (ruling that a grooming policy imposes a substantial hardship on the practice of faith).

ii. The Plaintiffs' Rights Under RFRA Were Clearly Established

RFRA is clear: "Government shall not substantially burden a person's exercise of religion[.]" 42 U.S.C. § 2000bb-1(a). And conduct as egregious as that alleged by the plaintiffs constitutes such a depravation.[11] Nevertheless, though the nature of the conduct is prohibited by RFRA, the defendants argue that RFRA's applicability in GTMO was not clearly established at the time of the

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general applicability[.]"). The statutory phrase "even if" implies application in other instances as well. *See Omar v. Casterline*, 414 F. Supp. 2d 582, 594 (W.D. La. 2006) (stating that "[t]he use of the word 'even' suggests that it applies in other circumstances as well").

[11] Under RFRA, of course, the government is permitted 11 to substantially burden a person's exercise of religion if the burden (1) "is in furtherance of a compelling governmental interest," and (2) "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Here, the government does not argue that any burdens were the least restrictive means of furthering a compelling governmental interest.

defendants' alleged conduct. Defs.' Supp. at 8. In support of this argument, the defendants cite *Rasul I* and argue that because *Rasul I* "did not even consider whether RFRA or any other federal law might apply at Guantanamo, it cannot logically be argued that the Supreme Court's decision clearly establishes that RFRA applies there." *Id.* The court rejects this argument for three reasons.

First, the Supreme Court decided *Rasul I* in 2004, but the defendants' alleged conduct in this case took place prior, between 2001 and 2004. *See generally,* Compl. For this reason, even if *Rasul I* called RFRA's application in GTMO into question, which it did not, it still would not support the government's position that the law, *at the time of the defendants' conduct,* was not well settled. Second, *Rasul I* reaffirms the Court's statements in *Vermilya-Brown* that the United States exercises "complete jurisdiction and control" over GTMO. *Rasul I*, 542 U.S. at 480; *Vermilya-Brown*, 335 U.S. at 382. Third, every case has unique feathers, yet the court need not find that "the very action in question has previously been held unlawful" to conclude that the right was clearly established. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

Turning to RFRA itself, the defendants provide the court with neither argument nor cases calling RFRA's applicability in GTMO into question. To the contrary, a review of the plain text of RFRA, as the court discussed previously, demonstrates its

broad reach.[12] The defendants argue that this court's prior opinion in *Larsen* places sufficient doubt as to the contours of a properly framed RFRA claim such that the defendants should be entitled to qualified immunity.[13] Defs.' Supp. at 9-10. The court cannot agree. Although the *Larsen* decision excludes a certain category of claims under RFRA, (those challenging non-neutrally applicable laws or policies), the opinion in no way limits RFRA claims solely to government policies rather than government actions. Because RFRA explicitly

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[12] This court previously dismissed the plaintiffs' 12 claims under the Fifth and Eighth Amendments to the Constitution. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2005). The court ruled that the individual defendants were entitled to qualified immunity as to these claims, principally, because the plaintiffs' rights under the Constitution were not clearly established at the time of the alleged conduct. *Id.* at 41. The court based its ruling on the legal proposition that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 43 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). The court ruled that "not until the Supreme Court decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (granting Guantanamo detainees the right to counsel) and *Rasul v. Bush*, 542 U.S. 466 (2004) (granting federal courts jurisdiction to hear Guantanamo detainees' habeas petitions), both decided after the plaintiffs' release from Guantanamo, were military personnel provided their first indication that detainees may be afforded a degree of constitutional protection." *Id.* at 44. In contrast, here, RFRA plainly applies to all U.S. territories and possessions, and the nature of GTMO, as a U.S. territory, was clearly established at the time of the alleged conduct.

[13] The defendants contention makes little sense given that this court issued its decision in *Larsen* in November 2004, after the conduct alleged in this case had concluded.

provides "a claim or defense to persons whose religious exercise is substantially burdened by government," the defendants' reading of *Larsen* as calling RFRA's application to these allegations into question is not reasonable. In other words, a "reasonable official" should still have understood that "what he [was] doing violates that right." *Butera*, 235 F.3d at 646.

To be absolutely clear, the plaintiffs are not alleging some novel statutory violation, one in which the defendants can reasonably claim qualified immunity. The plaintiffs allege that representatives of the United States government perpetrated blatant and shocking acts against them on account of their religion. Such activities, if true, constitute a direct affront to one of this nation's most cherished constitutional traditions. *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001). Relevant here, the right to religious freedom is embodied within RFRA's prohibition on government action. 42 U.S.C. § 2000bb(2), 2000bb-1, 2000bb-2.

The statute's unambiguous application to U.S. territories and possessions[14] should have placed the defendants on notice that they were prohibited from the alleged conduct in Guantanamo. The court recognizes that the defendants are not constitutional law scholars well versed on the jurisdictional reach of RFRA. And yet, given the abhorrent nature of the allegations and given "our Nation's fundamental commitment to religious liberty," *McCreary County*,

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[14] To say nothing of basic principles of morality and respect for human dignity.

Ky v. Am. Civil Liberties Union of Ky, 125 S. Ct. 2722, 2746 (2005) (O'Conner, J., concurring), it seems to this court that in this case "a reasonable official would understand that what he is doing violates that right."[15] *Hope*, 536 U.S. at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Because "[t]he shield provided by qualified immunity is designed to protect all but the most brazen violators," *Bevill v. UAB Walker College*, 62 F. Supp. 2d 1259 (N.D. Al. 1999), the court finds it inapplicable in the present case. Accordingly, the court rejects these defendants' attempts to escape liability by means of qualified immunity.

IV. CONCLUSION

For the foregoing reasons, the court denies the defendants' motion to dismiss the plaintiffs' RFRA claim. An order directing the parties in a manner consistent with this memorandum opinion is

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[15] 15 The defendants make much of the D.C. Circuit's statement that the right to observe ones faith is "one of 'the most treasured birthrights of every *American*.'" Defs.' Supp. at 7 (quoting *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (emphasis added)). To the defendants, this statement affirms its view that the First Amendment, and by implication RFRA, applies solely to Americans. Because the *Jackson* case did not present the Circuit with the question whether RFRA applies to non-Americans, the court reads the circuit's characterization of religious freedom as an affirmation of the importance of religious liberty in our society, not as a limitation on the breadth of its coverage under RFRA. Indeed, because RFRA applies to all "persons," 42 U.S.C. § 2000bb-1(a), the court doubts that the Circuit meant to categorically exclude non- Americans from RFRA's protection, particularly in a case not presenting the Circuit with that question.

separately and contemporaneously issued this 8th day of May, 2006.

RICARDO M. URBINA
United States District Judge

APPENDIX F - ENTERED February 6, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL *et al.*,	:
	:
Plaintiffs,	:
	:
v.	:
	:
DONALD RUMSFELD *et al.*,	:
	:
Defendants.	:

Civil Action No.: 04-1864 (RMU)
Document No.: 8

ORDER

GRANTING IN PART AND DEFERRING RULING IN PART ON THE DEFENDANT'S MOTION TO DISMISS

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 6th day of February, 2006, it is hereby

ORDERED that the defendants' motion to dismiss is **GRANTED** IN PART and **DEFERRED** IN PART; and it is

FURTHER ORDERED that the parties submit supplemental briefing to the court regarding

the plaintiffs' Religious Freedom Restoration Act claim within 45 days of this order.[1]

SO ORDERED.

RICARDO M. URBINA
United States District Judge

[1] The parties will each have a period of 20 days within which to file responses to the supplemental briefing.

ENTERED February 6, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIQ RASUL *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
DONALD RUMSFELD *et al.*,	:	
	:	
Defendants.	:	

Civil Action No.: 04-1864 (RMU)
Document No.: 8

MEMORANDUM OPINION

GRANTING IN PART AND DEFERRING RULING IN PART ON THE DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

On September 11, 2001, this nation experienced the worst terrorist attacks in its history. The September 11 attacks claimed over 3,000 American lives and severely undermined this nation's sense of security. The actions of the terrorist perpetrators, fueled by ignorance and intolerance, launched this nation's quest to identify, apprehend and bring to justice terrorist criminals who threaten this country. The plaintiffs herein, former detainees at the United States Naval Station at Guantanamo

Bay, Cuba ("GTMO" or "Guantanamo"), now petition this court for relief alleging acts which recast the roles of victim and wrongdoer. These allegations assert various forms of torture, which include hooding, forced nakedness, housing in cages, deprivation of food, forced body cavity searches, subjection to extremes of heat and cold, harassment in the practice of their religion, forced shaving of religious beards, placing the Koran in the toilet, placement in stress positions, beatings with rifle butts, and the use of unmuzzled dogs for intimidation. Most disturbing, however, is their claim that executive members of the United States government are directly responsible for the depraved conduct the plaintiffs suffered over the course of their detention. In essence, the plaintiffs assert that their captors became the beasts they sought to suppress.[1]

Currently before the court is the defendants' motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim on which relief can be granted. Because the defendants are immune from claims arising under international law, the court substitutes the United States as a defendant for these claims in place of the individual defendants. Because the plaintiffs have not exhausted their administrative remedies by bringing

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[1] "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967). As Mahatma Ghandi stated, "[w]hat difference does it make . . . whether the mad destruction is wrought under the name of totalitarianism or the holy name of liberty and democracy?"

their international law claims to an appropriate Federal agency, the court dismisses those claims. Because the defendants are entitled to qualified immunity from the plaintiffs' constitutional claims, the court dismisses those claims. Lastly, although the Religious Freedom Restoration Act may apply to United States action in Guantanamo Bay, the court considers the parties' briefing on this issue and the applicability of the doctrine of qualified immunity inadequate. Accordingly, the court defers ruling on the defendants' motion to dismiss as to this claim pending further briefing by the parties.

II. BACKGROUND

The plaintiffs allege the following:

In the months immediately following the September 11 attacks on America, the plaintiffs, all citizens of the United Kingdom, were in Afghanistan conducting humanitarian relief and trying to return to England. Compl. ¶¶ 2-3, 35. On November 28, 2001, an Uzbek warlord, General Rashid Dostum, captured three of the plaintiffs; Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed. *Id.* ¶ 2. One month later, General Dostum handed them over to the United States for a bounty. *Id.* ¶¶ 2, 42-44. After two weeks of suffering extensive abuse and interrogations under United States' custody, the military transported Rasul and Iqbal from Afghanistan to GTMO. *Id.* ¶¶ 37-64. Ahmed, however, stayed in Afghanistan for six weeks under United States custody, eventually succumbing to the pervasive interrogation techniques and falsely confessing to having ties with Al Qaeda. *Id.* ¶ 62. Only then, in

February 2002, did the United States transport Ahmed to Guantanamo. *Id.* ¶ 63.

The Taliban was the first to capture the fourth plaintiff, Jamal Al-Harith in Afghanistan. *Id.* ¶ 3. The Taliban accused Al-Harith of being a British spy and tortured him. *Id.* When the Taliban fell, Al-Harith was released and immediately contacted the British embassy officials to coordinate his evacuation. *Id.* After a month of coordinating with British officials, United States forces detained him and, in February of 2002, transported him to GTMO. *Id.* ¶¶ 3-4, 63.

Shortly before the plaintiffs' arrival in Guantanamo Bay in December 2002, defendant Donald Rumsfeld signed a memorandum approving more aggressive interrogation techniques that allegedly departed from the standards of care normally afforded military prisoners. *Id.* ¶ 9. Some of these previously prohibited techniques includes forcing the prisoners to endure stresspositions for up to four consecutive hours, disrobing prisoners, intimidating prisoners with dogs, twenty-hour interrogation sessions, forcing prisoners to wear hoods, shaving their hair, isolating the prisoners in total darkness and silence, and using physical contact. *Id.* In April 2003, Rumsfeld withdrew approval of these tactics. *Id.* ¶¶ 10-11.

Following this revocation, however, the detainees at GTMO continued to suffer from inhumane treatment. *Id.* ¶¶ 65-158. During the United States' detainment of the plaintiffs at GTMO, which has lasted over two years, the plaintiffs

suffered repeated beatings and forced body cavity searches. *Id.* ¶¶ 4, 6. Furthermore, prison guards frequently shackled the plaintiffs for many hours, causing wounds and permanent scarring, and also forced them to remain in stressful positions for hours, injected unknown substances into their bodies, and required them to live in cramped cages without protection from the elements. *Id.* ¶¶ 6, 70, 72, 85. In addition, the guards deprived the plaintiffs of adequate food, sleep, and communication with family members. *Id.* ¶ 6. The guards also humiliated and harassed the plaintiffs as they tried to practice their religion. *Id.* After months of extreme hardship and relentless interrogations, Rasul and Iqbal relented and confessed (falsely) to having ties with Al Qaeda. *Id.* ¶¶ 110, 127. Despite their confessions, after more than two years in United States custody without having any charges brought against them, in March of 2004, the United States released all of the plaintiffs, and they returned to their homes in the United Kingdom. *Id.* ¶ 137.

The plaintiffs filed the instant case against various military officials on October 27, 2004.[2] On

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[2] The defendants are Donald Rumsfeld, Secretary of Defense; Air Force General Richard Myers, Former Chairman of the Joint Chiefs of Staff; Air Army Major General Geoffrey Miller, Former Commander of the Joint Task Force at Guantanamo Bay Naval Base; Army General James Hill, Commander of the United States Southern Command; Army Major General Michael Dunlavey, Former Commander of the Joint Task Force at Guantanamo Bay Naval Base; Army Brigadier General Jay Hood, Commander of the Joint Task Force at Guantanamo Bay Naval Base; Marine Brigadier General Michael Lehnert, Commander of the Joint Task Force-160 at Guantanamo Bay Naval Base; Army Colonel Nelson

March 16, 2005, the defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to the Federal Rules of Civil Procedure 12(b)(1) and (6). The court turns to the defendants' motion.

III. ANALYSIS

A. Legal Standards

1. Legal Standard for a 12(b)(1) Motion to Dismiss

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C. Cir. 2004) (noting that "[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction").

Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of*

Cannon, Commander at Camp Delta at Guantanamo Bay Naval Base; Army Colonel Terry Carrico, Commander of Camp X-Ray-Camp Delta at Guantanamo Bay Naval Base; Army Lieutenant Colonel William Cline, Commander of Camp Delta at Guantanamo Bay Naval Base; Army Lieutenant Colonel Diane Beaver, Legal Advisor to General Dunlevey; and John Does 1-100. *See* Compl.

Columbia, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxite de Guinea*, 456 U.S. 694, 702 (1982)). On a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The court may dismiss a complaint for lack of subject-matter jurisdiction only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Because subject-matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

2. Legal Standard for a 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003) (citing FED R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 511-14 (2002), or "plead law or match facts to every element of a legal theory," *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal quotation marks and citation omitted).

Accordingly, "the accepted rule in every type of case" is that a court should not dismiss a complaint for failure to state a claim unless the defendant can show beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Warren v. Dist. of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004); *Kingman Park*, 348 F.3d at 1040. Thus, in resolving a Rule 12(b)(6) motion, the court must treat the complaint's

factual allegations – including mixed questions of law and fact – as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning*, 292 F.3d at 242. While many well-pleaded complaints are conclusory, the court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren*, 353 F.3d at 39; *Browning*, 292 F.3d at 242.

B. The Court Grants the Defendants' Motion to Dismiss the International Law Claims

The plaintiffs bring three actions against the defendants for alleged violations of the law of nations, and one action for alleged violations of the Geneva Conventions.[3] Compl. ¶¶ 159-84. Specifically, the plaintiffs allege that they were subjected to prolonged arbitrary detention, *id.* ¶ 159-166, torture, *id.* ¶ 167-172, and cruel, inhumane, and degrading treatment, *id.* ¶ 173-179.

The Attorney General's designee, however, certified that the defendants were acting within the scope of their employment "at the time of the conduct alleged in the complaint." Defs.' Mot. to

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[3] The plaintiffs invoke the Alien Torts Statute, 28 U.S.C. § 1350, as the jurisdictional basis for their suit. Compl. ¶¶ 159-84. That statute provides, *inter alia*, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

Dismiss ("Defs.' Mot."), Ex. 1. Because of this certification, the defendants argue that the plaintiffs' claims are barred by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679, which directs that the Federal Torts Claims Act ("FTCA") provides the exclusive remedy for tortious conduct committed by government employees acting within the scope of their employment. Defs.' Mot. at 4; 28 U.S.C. § 2679(b)(1).

The plaintiffs, however, contend that as a matter of law, the defendants were not acting within the scope of their employment, Pls.' Opp'n at 8-13, or alternatively, that the entirety of their claims fall within either of the two exceptions to the exclusive remedy provision of the FTCA. Pls.' Opp'n at 18. As discussed below, the plaintiffs' claims against the defendants under customary international law and the Geneva Conventions[4] are barred by the Westfall Act. For this reason, the court substitutes the United States as a defendant for these claims and dismisses them for the plaintiffs' failure to exhaust their administrative remedies.

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[4] The plaintiffs argue that the Geneva Conventions are enforceable by the plaintiffs. Pls.' Opp'n at 25. Since the parties submitted their briefs to the court, however, the D.C. Circuit has ruled that the Geneva Conventions do not incorporate a private right to enforce its provisions in court. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622. Thus, the Geneva Conventions do not give the plaintiffs an independent vehicle for their lawsuit.

1. The Westfall Act Requires that the Court Substitute the United States as a Defendant in Place of the Individual Defendants.

a. Legal Standard for Immunity of Federal Officers Under the Westfall Act

The Westfall Act confers immunity on federal employees "by making an FTCA action against the Government the exclusive remedy for torts committed by Government employees in the scope of their employment." *United States v. Smith*, 499 U.S. 160, 163 (1991); 28 U.S.C. § 2679(b)(1). The Act provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). In a case where the Attorney General, or by designation the United States Attorney in the district where the claim is brought, files a certification that the original defendant was acting within the scope of his employment, such certification has the following consequences: (1) if

the suit originated in state court, then the Attorney General or his designee is required to remove it to federal court; (2) the United States shall be substituted as the sole defendant; and (3) if the plaintiff has not brought suit pursuant to the FTCA, the suit converts to one against the United States under the FTCA. 28 U.S.C. § 2679(d)(2); 28 C.F.R. § 15.3(a) (2002); *Haddon v. United States*, 68 F.3d 1420, 1423 (D.C. Cir. 1995). The certification is conclusive for purposes of removal. The substitution and conversion consequences, however, are subject to judicial review; that is, they are contingent on whether the court finds that the original defendant acted within the scope of his employment. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (stating that "[t]he Attorney General's certification that a federal employee was acting within the scope of his employment . . . does not conclusively establish as correct the substitution of the United States as defendant in place of the employee"); *Haddon*, 68 F.3d at 1423 (noting that "the federal court may determine independently whether the employee acted within the scope of employment and, therefore, whether to substitute the federal government as the proper defendant").

When the court reviews the validity of a certification filed by the Attorney General or his designee, the certification is entitled to "*prima facie* effect" that the defendants acted within the scope of their employment. *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994) (internal citations omitted). The burden then shifts to the plaintiffs to first allege facts that, if true, would exceed the scope of the defendants' employment. *Stokes v. Cross*, 327 F.3d

1210, 1215 (D.C. Cir. 2003). Upon allegations of such facts, the plaintiffs are entitled to discovery and evidentiary hearings to resolve material issues of fact. *Id.* However, the plaintiffs must still prove by a preponderance of the evidence that the defendants' actions were outside the scope of their employment for their claims to survive. *Kimbro*, 30 F.3d at 1509; *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 264 (D.D.C. 2004), *aff'd* 412 F.3d 190 (D.C. Cir. 2005); *Maron v. United States*, 126 F.3d 317, 322 (4th Cir. 1997) (applying identical factors to determine scope of employment).

To determine whether a federal employee was acting within the scope of his employment, a federal court must apply the law of the state where the tortious act occurred. *Tarpeh-Doe v. United States*, 28 F.3d 120, 123 (D.C. Cir. 1994); *Garber v. United States*, 578 F.2d 414, 415 (D.C. Cir. 1978). In this case, however, the alleged tortious acts occurred at GTMO. Since Guantanamo does not provide adequate guidelines for determining scope of employment and the acts are "inextricably bound up with the District of Columbia in its role as the nation's capital[,]" the relevant law to apply is that of the District of Columbia. *Mundy v. Weinberger*, 554 F. Supp. 811, 818 (D.D.C. 1982). The law of the District of Columbia is drawn from the Restatement (Second) of Agency. *Haddon*, 68 F.3d at 1423. The Restatement provides that

> [c]onduct of a servant is within the scope of employment if, but only if: (1) it is of the kind he is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the master; and (4) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1957); *Hechinger Co. v. Johnson*, 761 A.2d 15, 24 n.5 (D.C. 2000).

b. The Defendants Were Acting Within the Scope of their Employment[5]

i. Nature of the Conduct

To constitute action within the scope of one's employment, first, the conduct must be "of the same general nature as that authorized" or "incidental to the conduct authorized." RESTATEMENT (SECOND) OF AGENCY § 229 (1957). The District of Columbia "liberally construes the doctrine of

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[5] As a threshold concern, the plaintiffs argue that violations of international law (specifically torture, cruel and degrading treatment, and prolonged arbitrary detention), as a matter of law, fall outside the scope of employment because they are contrary to the official position of the United States. Pls.' Opp'n at 11 (citing a State Department report to the United Nations Committee Against Torture). This argument is unavailing for three reasons. First, Congress established a framework where state law, not State Department representations to the United Nations, governs the scope of employment determination. 28 U.S.C. § 2679(d)(2)-(3); *see also Haddon*, 68 F.3d 1420, 1424-25 (D.C. Cir. 1995) (applying District of Columbia law to determine federal employee's scope of employment under the FTCA). Second, to the extent the Executive Branch can make legal representations to this court regarding the scope of an employee's conduct, they have done so through the Attorney General's certification. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995). Finally, "[d]efining an employee's scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines *who* may be held liable for that conduct, an employee or his boss." *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 265 (D.D.C. 2004) (emphasis in original), *aff'd* 412 F.3d 190 (D.C. Cir. 2005). Accordingly, the court construes the scope of a government employees' employment by looking at the specific process detailed in the statute rather than by consulting State Department reports to the United Nations.

respondeat superior . . . with respect to the first prong of the Restatement (Second) of Agency § 228(1)." *Stokes*, 327 F.3d at 1216 (citing *Haddon*, 68 F.2d at 1425-26 and *Weinberg v. Johnson*, 518 A.2d 985, 988-90 (D.C. 1986)). It is undisputed that the named defendants initially acted pursuant to directives contained in a December 2, 2002 memorandum from defendant Rumsfeld. Compl. ¶¶ 9, 10. In April 2003, defendant Rumsfeld withdrew explicit authorization for use of torture. *Id.* ¶ 11. The plaintiff alleges that despite this removal of authorization to torture, the defendants persisted in utilizing these tactics. *Id.* For this reason, the crux of the dispute here is whether the defendants' actions after April 2003 were "incidental to the conduct authorized." RESTATEMENT (SECOND) OF AGENCY § 229.

> Analyzing the meaning of "incidental conduct," the D.C. Circuit has stated:
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> > [C]onduct is "incidental" to an employee's legitimate duties if it is "foreseeable." "Foreseeable" in this context does not carry the same meaning as it does in negligence cases; rather, it requires the court to determine whether it is fair to charge employers with responsibility for the intentional torts of their employees. To be foreseeable, the torts must be "a direct outgrowth of the employee's instructions or job assignment." It is not enough that an employee's job provides

> an "opportunity" to commit an intentional tort.

Haddon, 68 F.3d at 1424. (citations omitted). The defendants argue that their actions were incidental to the conduct authorized. Defs.' Reply at 8.

The law of the District of Columbia supports the defendants' position. The courts in the District of Columbia categorize practically any conduct as falling within the scope of, or incidental to, that authorized by their employer so long as the action has some nexus to the action authorized. For example, in *Weinberg v. Johnson*, the D.C. Court of Appeals ruled that a laundromat employee's decision to shoot a customer over clothes which the employee had a duty to remove from a laundry machine if left unattended constituted conduct done "in virtue of his employment and in furtherance of its ends." 518 A.2d at 988 (internal quotations omitted) (stating that the employer will be liable under the *respondeat superior* doctrine so long as the employee's conduct does not include a "personal motive"). Applying this principle, the D.C. Circuit ruled that a delivery person's sexual assault of a customer, following an argument over inspecting and paying for the delivered goods, was incidental to his employment for a trucking company. *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976) (stating that though "the assault was perhaps at the outer bounds of respondeat superior . . . [i]t is within the enterprise liability of vendors like furniture stores and those who deliver for them that deliverymen, endeavoring to serve their masters, are likely to be in situations of friction

with customers" which may lead to "altercations" and "violence").

Here, the United States authorized military personnel in Guantanamo to exercise control over the detainees and question the detainees while in the custody of the United States. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *Khalid v. Bush*, 355 F. Supp. 2d 311, 319 (D.D.C. 2005) (stating that through the Authorization for Use of Military Force, Congress "gave the President the power to capture and detain those who the military determined were either responsible for the 9/11 attacks or posed a threat of future terrorist attacks").[6] Like *Lyon* and *Weinberg*, the complaint points to actions which arose specifically from authorized activities. Additionally, the plaintiffs' complaint alleges torture and abuse tied exclusively to the plaintiffs' detention in a military prison and to the interrogations conducted therein. *See generally* Compl. If the doctrine of *respondeat superior* is panoptic enough to link sexual assault with a furniture deliveryman's employment because of the likelyfriction that may arise between deliveryman and customer, it must also include torture and inhumane treatment wrought upon captives by their captors. Stated differently, if "altercations" and "violence" are foreseeable

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[6] The court notes that *Khalid v. Bush* is on appeal with the D.C. Circuit. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), *appeal docketed*, No. 05-5063 (D.C. Cir. notice of appeal March 2, 2005). The court cites *Khalid* solely to demonstrate that the defendants sued in this case were acting pursuant to a congressional authorization, not for that case's ultimate legal conclusions regarding the legality of the Authorization.

consequences of a furniture deliveryman's employment, then torture is a foreseeable consequence of the military's detention of suspected enemy combatants. For these reasons, the court rules that the defendants' conduct was incidental to their roles as military officials. Accordingly, the alleged activity of the defendants was "a direct outgrowth of the employees instructions [and] job assignment" and within the scope of their employment. *Haddon*, 68 F.3d at 1424 (citations omitted).

ii. Space and Time Limitations

Under the Restatement (Second) of Agency, the court's second line of inquiry concerns whether the defendants' actions took place within the space and time limitations authorized by the employer. RESTATEMENT (SECOND) OF AGENCY § 228. Because the parties do not dispute that the defendants' actions took place within the time and place limitations sanctions by the United States, Pls.' Opp'n at 9-10, the court proceeds to the third and fourth prongs of the scope of employment inquiry.

iii. The Purpose of the Conduct[7]

Next the court addresses whether the alleged actions were perpetrated, at least in part, to for the purpose of serving the master. RESTATEMENT (SECOND) OF AGENCY § 228. "[W]here the employee is in the course of performing job duties, the employee is presumed to be intending, at least in part, to further the employer's interests." *Weinberg*, 518 A.2d at 989 (citation omitted). Furthermore, the D.C. Circuit has stated that, "[t]he intent criterion

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[7] The plaintiffs assert that the defendants' actions were, as a matter of law, outside the scope of their employment because they were not "legitimate executive acts." Pls.' Opp'n at 12. The plaintiffs fail to adequately explain why all actions within a federal employee's scope of employment must be "legitimate executive acts" but rather make vague analogies to "foreign tyrants seeking to avoid liability in U.S. courts." *Id.* The plaintiffs state that because foreign tyrants are not allowed immunity for acts of torture, neither should the defendants in this case. *Id.* at 12-13 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Trahano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989); *In re: Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 497-98 & n.10 (9th Cir. 1992); *In re: Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995); *In re: Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995)). The plaintiffs' argument lacks merit. These cases do not align with the facts presently before the court in that they involve foreign officials ineligible under the FTCA to receive immunity but eligible for immunity under various legislative acts and principles of international law (e.g., Foreign Sovereign Immunity Act, 28 U.S.C. § 1605; Torture Victims Protections Act, 28 U.S.C. § 1350 Note; Act of State Doctrine; Head of State Immunity). By enacting the FTCA, Congress directed that state law governs the scope of employment for claims brought against federal employees. For this reason, case law interpreting legislation governing foreign officials is inapplicable to the present circumstance.

focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough to embrace any intentional tort arising out of a dispute that 'was originally undertaken on the employer's behalf.'" *Stokes*, 327 F.3d at 1216 (quoting *Weinberg*, 518 A.2d at 992). Moreover, "[t]he employer does not avoid liability for the employee's intentional torts . . . if the tort is committed partially because of a personal motive, such as revenge, as long as 'the employee [is] actuated, at least in part, by a desire to serve his principal's interest.'" *Weinberg*, 518 A.2d at 988 (citing *Jordan v. Medley*, 711 F.2d 211, 214 (D.C. Cir. 1983) and RESTATEMENT (SECOND) OF AGENCY § 245 cmt. f (1958)).

The plaintiffs do not allege that the tortious actions arose purely from personal motives, but claim that the defendants' actions are inextricably intertwined with their respective roles in the military. Compl. ¶¶ 37-137 (detailing the defendants' alleged actions within the context of the United States' military actions in Afghanistan following the September 11, 2001 attacks). As the Supreme Court recently stated, "detention of individuals . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

The plaintiffs' allegations of torture, though reprehensible, do not offset the presumption that these individuals were acting on behalf of their employer during "the course of performing job

duties." *Weinberg*, 518 A.2d at 989. The plaintiffs have not proffered any evidence that would lead this court to believe that the defendants had any motive divorced from the policy of the United States to quash terrorism around the world. *Weinberg*, 518 A.2d at 990 (excluding actions committed solely for the servant's own purposes from the scope of employment). Thus, the court rules that the individual defendants were acting, at least in part, to further the interests of their employer, the United States.

iv. Foreseeability of the Conduct

Finally, the court addresses whether the use of force was foreseeable. RESTATEMENT (SECOND) OF AGENCY § 228. "The inquiry is necessarily whether the intentional tort was foreseeable, or whether it was 'unexpectable in view of the duties of the servant.'" *Majano v. Kim*, No. CIV.A.04-201, 2005 WL 839546, at *8 (D.D.C. April 11, 2005) (quoting RESTATEMENT (SECOND) OF AGENCY § 245)). However, "a broad range of intentional tortuous conduct has been found to be within the scope of employment despite the violence by which injury was inflicted." *Id.* In fact, employers may be held liable for "foreseeable altercations [that] may precipitate violence . . . even though the particular type of violence was not in itself anticipated or foreseeable." *Lyon*, 533 F.2d at 651.

The court in *Majano* addressed this issue in depth. In *Majano*, a manager of the Smithsonian tried to enter a secured building without using her identification card. 2005 WL 839546, at *2. A janitor

asked to see her identification before allowing her in, but rather than showing her identification, the manager became angry and assaulted the janitor. *Id.* The court held that "[a] physical or verbal altercation between fellow employees over the manner of entrance to a Smithsonian building in this heightened security environment is unfortunate – and may be administratively – sanctionable – but nonetheless expectable." *Id.* at *9.

In the present case, the heightened climate of anxiety, due to the stresses of war and pressures after September 11 to uncover information leading to the capture of terrorists, would naturally lead to a greater desire to procure information and, therefore, more aggressive techniques for interrogations. Indeed, according to the plaintiffs, this increased motivation culminated in defendant Rumsfeld's December 2002 memorandum approving more aggressive interrogation techniques. Compl. ¶ 9. Although these aggressive techniques may be sanctionable within the military command, especially after the 2002 memorandum was revoked, the fact that abuse would occur is foreseeable. Accordingly, the defendants' employment situation did not present a mere opportunity for tortious activity to occur but provided the kindling for such activity to grow without the appropriate supervision. *See Boyken*, 484 A.2d at 563 (concluding that employment which affords the mere opportunity to pursue a personal venture is insufficient to make the employer liable). Consequently, the alleged actions of the defendants were within the scope of their employment.

2. The Individual Defendants are not Liable Pursuant to the Exceptions to the Westfall Act

The plaintiffs contend, in the alternative, that the individual defendants can be held liable pursuant to one of the two exceptions under the Westfall Act. Specifically, a grant of immunity under the Westfall Act does not apply when a civil action is "brought [1] for violations of the Constitution of the United States, or . . . [2] for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A)-(B). The plaintiffs argue that their claims brought under the Alien Tort Claims Act and international law fall within both exceptions. Pls.' Opp'n at 18-23. For the reasons that follow, the court finds the plaintiff's position unpersuasive.

a. Constitutional Exception

The plaintiffs first assert that all of their claims are entitled to a waiver of immunity pursuant to the Westfall Act because they have alleged constitutional violations. *Id.* at 18. The plaintiffs state that "by its plain language [the Westfall Act] provides that the exclusive remedies of the FTCA do not apply to the plaintiffs' 'civil action' when a constitutional violation is asserted." *Id.* at 19. The plaintiffs assert that a "civil action" refers to the entire proceeding and not merely an individual claim. *Id.* (citations omitted).

The plaintiffs' argument, however, has been rejected by the Supreme Court.[8] *Finley v. United States*, 490 U.S. 545, 553-54 (1989), *superseded by statute,* 28 U.S.C. § 1367.[9] In *Finley*, the Supreme Court declared that Congress' change to the FTCA from "claim against the United States," to "civil actions on claims against the United States," does not mean to "permit[ ] the assertion of jurisdiction over any 'civil action,' so long as that action *includes* a claim against the United States."[10] *Id.* at 554 (emphasis in original).

This interpretation is consistent with Congress' intent. H.R. Rep. No. 100-700 at 5950 (1988) (stating that "[t]he 'exclusive remedy'

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[8] The plaintiffs argue that because the international law and constitutional law claims arise out of "a common nucleus of operative facts," the defendants are not entitled to seek substitution of the United States for the plaintiffs' international law claims. Pls.' Opp'n at 18-19. For the reasons set forth in *Finley*, the court rejects the plaintiffs' argument. *See Finley v. United States*, 490 U.S. 545, 553-556 (1989).

[9] The plaintiffs argue that Congress' abrogation of the Court's interpretation in *Finley* "clearly indicates a congressional preference that FTCA cases arising out of a single nucleus of operative facts be tried in a single proceeding." Pls.' Opp'n at 22, n.10. Though Congress' passage of 28 U.S.C. § 1367 indicates its disagreement with the Supreme Court's interpretation of 28 U.S.C. § 1346, the statutory provision at issue in *Finley*, it has no bearing on the Court' interpretation of 28 U.S.C. § 2679.

[10] The Court attributed Congress' change in the statute to language presented in the adoption of the Federal Rules of Civil Procedure which indicates that "there shall be one form of action to be known as a 'civil action.'" *Finley*, 490 U.S. at 555; Fed. R. Civ. P. 2.

provision . . . is intended to substitute the United States as the solely permissible defendant in all common law tort actions"). Furthermore, Congress indicated that the Westfall Act "would provide immunity for federal employees from personal liability for common law torts committed within the scope of their employment." *Id.* At 2. The plaintiffs' suggested interpretation, in addition to conflicting with *Finley*, runs contrary to Congress' intent.

b. Statutory Exemption

The plaintiffs also argue that they can invoke a waiver of immunity for purposes of the Westfall Act because the individual defendants violated the Alien Tort Claims Act ("ATCA") by committing torts "in violation of the law of nations[.]"[11] Pls.' Opp'n at 22-24 (citing 28 U.S.C. § 1350). They further assert that the plain meaning of the ATCA establishes both a 'jurisdictional grant and a private right to sue for tortious violations of international law. *Id.* at 23. The Supreme Court, however, recently held that the ATCA is strictly a jurisdictional statute available to enforce a small number of international norms. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004). Before adapting the law of nations to private rights, the Court called on all federal courts to exercise caution and only allow norms that are accepted "among

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[11] Pursuant to the Alien Tort Claims Act ("ATCA"), "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or treaty of the United States." 28 U.S.C. § 1350.

civilized nations" to support a cause of action. *Id.* (citations omitted).[12]

A review of *Sosa* shows that the ATCA facilitates the bringing of an action for violations of the law of nations. The plain language of the ATCA, however, does not confer rights nor does it impose obligations or duties that, if violated, would trigger the Westfall Act's statutory exception. For the Westfall Act's statutory exception to apply, the ATCA would have to create substantive rights or duties that can be violated for purposes of the Westfall Act. *Schneider*, 310 F. Supp. 2d at 266 (relying on *Alvarez-Machain*, 266 F.3d at 1053-54 for the proposition that the ATCA cannot be violated for purposes of § 2679(b)(2)(B)). A claim brought pursuant to the ATCA, therefore, is based on a violation of rights conferred under international law, not the ATCA itself. *Alvarez-Machain*, 266 F.3d at 1053 (citing *Smith*, 499 U.S. at 174). Accordingly, the court concludes that the plaintiffs fail to satisfy the exception under 28 U.S.C. § 2679(b)(2)(B).

The plaintiffs again attempt to obtain a waiver of immunity under 28 U.S.C. § 2679(b)(2)(B)

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[12] The Supreme Court in *Sosa* provided another reason for barring private causes of action for violations of international law. The Court warned that before recognizing these causes, the courts should consider "the potential implications for the foreign relations of the United States . . . [and be] wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). A more thorough discussion of the foreign affairs concerns calling for a bar to judicial review of this case is presented *infra* in Part III.B.3.

by arguing that their cause of action for violations of international law "arises under" the laws of the United States for purposes of jurisdiction under 28 U.S.C. § 1331. Pls.' Opp'n at 40-42. They claim that the defendants' obligation to uphold the Constitution follows the defendants wherever they are stationed or located. *Id.* The Westfall Act, however, is explicit in allowing an exception only for "a violation of a statute of the United States [or] a violation of the Constitution of the United States," not federal common law or international law. 28 U.S.C. § 2679(b)(2)(A)-(B); *Schneider*, 310 F. Supp. 2d at 267. Moreover, the plaintiffs cannot bring suit for a violation of 28 U.S.C. § 1331 because this statute confers only federal question jurisdiction, not a cause of action for violations of international law. *Schneider*, 310 F. Supp. 2d at 267. Accordingly, the court concludes that the plaintiffs fail to satisfy 28 U.S.C. § 2679(b)(2)(B).

In sum, the plaintiffs fail to meet their burden of proving that the individual defendants acted outside the scope of their employment or that their claims fall within one of the exceptions to the exclusive remedy provision of the FTCA. That is, the plaintiffs fail to rebut the Attorney General's certification. Therefore, the Attorney General's certification that the individual defendants acted within their scope of employment maintains its

prima facie effect,[13] *Kimbro*, 30 F.3d at 1509, and the court substitutes the United States in place of the individual defendants. 28 U.S.C. § 2679(d)(2). This substitution effectively grants the defendants absolute immunity for violations of international law. *Mitchell v. Carlson*, 896 F.2d 128, 136 (5th Cir. 1990) (stating that "Congress made it clear that, once certified, federal employees remain immune from suit for their tortious actions taken within the scope of their government employment").

3. The Plaintiffs Have Failed to Exhaust their Administrative Remedies

Under the FTCA, "[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). Because the plaintiffs in this case did not proceed against the United States, they did not first present their claim to the appropriate Federal agency. Consequently, the plaintiffs have not exhausted their administrative remedies. *McNeil v. United*

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[13] The court need not conduct discovery or evidentiary hearings because the facts alleged by the plaintiffs, taken as true, do not exceed the defendants' scope of employment. *See Singleton v. United States*, 277 F.3d 864, 871 (6th Cir. 2002) (ruling that no hearing is necessary "where even if the plaintiff's assertions were true, the complaint allegations establish that the employee was acting within the scope of his/her employment") (internal quotations omitted).

States, 508 U.S. 106, 113 (1993) (stating that the "FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies"). Therefore, the court grants the defendants motion to dismiss for lack of jurisdiction because 28 U.S.C. § 2675(a) requires the claimant to bring a timely administrative claim before bringing suit against the government. *See also Simpkins v. Dist. of Columbia Gov't*, 108 F.3d 366, 371 (D.C. Cir. 1997) (holding that the district court lacked jurisdiction because the claimant had not exhausted its administrative remedies).

C. The Court Grants the Defendants' Motion to Dismiss the Plaintiffs' Constitutional Violation Claims

In addition to their claims under international law, the plaintiffs claim that the defendant violated the plaintiffs' rights under the Fifth and Eighth Amendments to the U.S. Constitution. Compl. ¶¶ 185-202. The defendants argue that under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971), they are entitled to qualified immunity. Defs.' Mot. at 14-17. For the reasons that follow, the court agrees.

1. Legal Standard for a *Bivens* Claim and the Qualified Immunity Defense

A plaintiff may bring a civil action for money damages against a federal official in his or her individual capacity for a violation of the plaintiffs' constitutional rights. *Bivens*, 403 U.S. at 389.

Federal officials may be entitled to a defense of qualified immunity, however. *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (citing *Harlow*, 457 U.S. at 818). Qualified immunity "shield[sofficials] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. It "provides not simply a defense to liability, but also an 'entitlement not to stand trial or face the other burdens of litigation.'" *Farmer v. Moritsugu*, 163 F.3d 610, 613 (D.C. Cir. 1998) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

In evaluating a *Bivens* claim to which a defendant has raised the qualified immunity defense, the court must follow a two-pronged analysis. *Butera v. Dist. of Columbia*,[14] 235 F.3d 637, 646 (D.C. Cir. 2001) (citing *Wilson*, 526 U.S. at 609). First, as a threshold matter, the court must determine whether the plaintiff has alleged the deprivation of an actual constitutional right. *Id.*; *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In defining an "actual constitutional right," a court must be careful to avoid defining the right in overly general terms "lest [it] strip the qualified immunity defense of all meaning." *Butera*, 235 F.3d at 646. Instead, the court must identify the right with the appropriate level of specificity so as to allow officials to

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[14] *Butera* involved a suit brought against state officials pursuant to 42 U.S.C. § 1983. *Butera*, 235 F.3d at 640-41. The Supreme Court has held, however, that there is no distinction between a *Bivens* suit and suit brought under section 1983 for purposes of immunity. *Butz v. Economou*, 438 U.S. 478, 508 (1978); *Gray v. Poole*, 243 F.3d 572, 577 n.4 (D.C. Cir. 2001).

reasonably anticipate when their conduct may give rise to liability for damages. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). Second, the court must decide whether the constitutional right was clearly established at the time of the defendants' action. *Id.* A right is "clearly established" if "the contours of that right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Wilson*, 526 U.S. at 614-15); *see also Crawford-El v. Britton*, 523 U.S. 574, 591 (1998) (stating that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct"). Although the specific action in question need not have been held unlawful by the courts, its unlawfulness in light of pre-existing law must have been apparent to the defendant. *Butera*, 235 F.3d at 646.

2. The Defendants are Entitled to Qualified Immunity

The plaintiffs allege violations of their right to due process under the Fifth Amendment and their right to be free from cruel and unusual punishment under the Eighth Amendment. Compl. ¶¶ 185-202. Specifically, the plaintiffs allege that military personnel subjected them to arbitrary and extended deprivation of liberty without counsel or a hearing to address the deprivation of liberty, frequent beatings, extended interrogations, insufficient shelter and food, and other humiliating treatment. *See generally* Compl.

Before the court can address whether the plaintiffs have alleged a constitutional deprivation, or whether any such rights were clearly established, the rights must be defined at the appropriate level of specificity; that is, "the court must define the right to a degree that would allow officials 'reasonably [to] anticipate when their conduct may give rise to liability for damages[.]'" *Butera*, 235 F.3d at 646 (internal quotation omitted); *Anderson*, 483 U.S. at 639 (rejecting the notion that a mere allegation of a right to "due process of law" is adequate to defeat a qualified immunity defense against a due process claim). Otherwise, defining a constitutional right in overly broad language would "strip the qualified immunity defense of all meaning[.]" *Butera*, 235 F.3d at 646. For this case, the appropriate level of specificity requires inquiry into whether the Constitution affords Fifth Amendment due process protection to aliens captured abroad and brought within the exclusive jurisdiction and control of the United States at Guantanamo.

a. The Court Reserves Judgment as to Whether the Plaintiffs have Stated a Constitutional Right

Though the court might typically hold that the actions alleged by the plaintiffs contravene the Fifth Amendment[15] but not the Eighth Amendment,[16] the

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[15] *E.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (stating that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action"); *Rochin v. California*, 342 U.S. 165, 209 (1952) (espousing the "shock the conscience" test in determining that methods of gathering evidence that are "so

extent to which Guantanamo detainees may avail themselves of constitutional protections is currently before the D.C. Circuit. *Khalid*, 355 F. Supp. 2d 311, *appeal docketed*, No. 05-5063 (D.C. Cir. March 4, 2005).

This determination requires the court to balance the interests of the detainees' constitutional rights, the executive branch's authority to classify individuals as enemy combatants and detain those individuals according to the government's discretion without undue court interference, and the scope of

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brutal and so offensive to human dignity" violate the due process clause); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1938) (stating that "the rack and torture chamber may not be substituted for the witness stand," and that tortuous interrogation constitutes a violation of an individuals' due process rights).

[16] The Eighth Amendment is not relevant here because it only applies to convicted criminals. *Bell v. Wolfish*, 441 U.S. 520, 579 (1979); *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998). If the plaintiffs' designation as enemy combatants qualified them for Eighth Amendment protections, that protection would further affirm the court's view that the defendants violated the plaintiffs' constitutional rights. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (concluding that "the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain'") (citation omitted); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (holding that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (noting that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man"); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (stating that "it is safe to affirm that punishments of torture . . . are forbidden by [the Eighth Amendment] to the Constitution").

the judiciary's role in this case. Unsure of the way in which the D.C. Circuit will strike such a balance, or at least inform the contours of this trichotomy, a judicial determination by this court regarding the first prong under *Bivens* is imprudent. Because a resolution on this matter is forthcoming and because the court has independent grounds to dismiss the claims under the second *Bivens* prong, the court reserves judgment on whether the Guantanamo detainees enjoy Fifth and Eight Amendments protections. Consequently, the court begins its analysis with whether the plaintiffs' alleged constitutional rights were clearly established at the time of the alleged abuse.

b. Any Constitutional Right was Not Clearly Established

Assuming *arguendo* that the D.C. Circuit or Supreme Court extends constitutional protections to the detainees, the plaintiffs still have the burden of proving that these rights were clearly established at the time of the alleged conduct. *Butera*, 235 F.3d at 646. To prove their alleged constitutional rights were clearly established, the plaintiffs must show that a reasonable person in the defendants' position would have been aware that such rights existed. *Id.* A reasonable person's understanding must be taken "in light of the specific context of the case, [and] not as a broad general proposition." *Saucier*, 533 U.S. at 201. Although the specific action in question had not been held unlawful by the courts at the time of the plaintiffs' detention, the defendants are not entitled to qualified immunity if the unlawfulness of their alleged actions was *apparent* in light of pre-existing

law. *Butera*, 235 F.3d at 646 (quoting *Anderson*, 483 U.S. at 640). Accordingly, the court will look to case law that was available to the defendants at the time of the plaintiffs' detention. Only with this foundation can the court determine whether a reasonable person would, at the time of the alleged torture, be aware that the plaintiffs were entitled to the Fifth Amendment rights they claim.

In 1950, the Supreme Court in *Johnson v. Eisentrager*, decided the seminal case on the applicability of constitutional protections to non-resident enemy aliens. 339 U.S. 763 (1950). Specifically, these non-resident enemy aliens were German citizens detained in China by the United States military after Germany's surrender and designated as enemies by a Military Commission. *Id.* at 766. In determining what rights to afford these individuals, the Supreme Court began by noting that courts have only given an alien constitutional rights when the alien was present within the territorial jurisdiction of the Judiciary. *Id.* at 771; *accord United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (stating that "neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect to our own citizens").

Of the aliens present within the Judiciary's territorial jurisdiction, the Court took care in distinguishing the rights afforded resident aliens and the rights afforded resident *enemy* aliens. *Eisentrager*, 339 U.S. at 770-77. The court stated that although resident aliens are granted a "generous and ascending scale of rights as he

increases his identity with our society[,] . . . a resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists." *Id.* at 770, 775; *accord Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"). Indeed, the Court further acknowledged that "[e]xecutive power over aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security," and "it seems not to have been supposed [by our founders] that a nation's obligations to its foes could ever be put on parity with those to its defenders." *Eisentrager*, 339 U.S. at 774, 775. Therefore, the Court determined that giving constitutional rights to non-resident enemy aliens would "hamper the war effort and bring aid and comfort to the enemy" and be paradoxical in light of the fact that American citizens conscripted into military service are stripped of Fifth Amendment protections. *Id.* at 779, 783. Accordingly, the Court concluded that because the "prisoners were at no relevant time within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of the United States[,]" non-resident enemy aliens are not entitled to Fifth Amendment protections. *Id.* at 777, 785.

The plaintiffs insist, however, that *Eisentrager* is easily distinguishable because none of the plaintiffs in the instant case were charged with a

crime, let alone charged and convicted of being enemy combatants as in *Eisentrager*. While this distinction proved crucial in Supreme Court decisions after the plaintiffs' release from Guantanamo, discussed *infra*, the facts in this case are sufficiently similar[17] to the situation in *Eisentrager* for a reasonable person to conclude that detainees were not afforded the specific Fifth Amendment protections at issue. Like *Eisentrager*, the plaintiffs are non-resident aliens captured abroad during a time of war and detained within a territory over which the United States does not have sovereignty. *Rasul v. Bush*, 542 U.S. 466, 480 (2004). Thus, the plaintiffs' attenuated connections with the United States coupled with the dispute over whether Guantanamo is within the territorial jurisdiction of

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[17] *Johnson v. Eisentrager* clearly distinguished between an alien friend (a subject of a foreign state at peace with the United States) and an alien enemy (a subject of a foreign state at war with the United States). 339 U.S. 763, at 769 n.2 (1950). However, this distinction is difficult to apply to terrorists because they identify with a particular ideology rather than a particular state. Given the pressures after 9/11 to identify and capture terrorists and the added difficulties in identifying terrorists today compared with identifying enemies during World War II, a military official should be afforded some deference in projecting what constitutional rights to afford individuals captured in a wartorn country, under battlefield conditions, and whose legal classification is ambiguous at best. Indeed, the Supreme Court stated that "[i]t is war that exposes the *relative* vulnerability of the alien's status." *Id.* at 771 (emphasis added).

the Judiciary[18] would lead a reasonable person to believe that the plaintiffs would not be afforded any constitutional protections even under a "generous and ascending scale of rights[.]" *Eisentrager*, 339 U.S. at 770.

Although *Eisentrager* was the seminal case at the time of the plaintiffs' detainment, other cases illuminate this clouded area of law. For example, in *United States v. Verdugo-Urquidez* the Court affirmed and summarized the holding in *Eisentrager* and its progeny as "establish[ing] only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. 259, 271 (1990) (citing *Plyler v. Doe*, 457 U.S. 202, 212 (1982)). In *Verdugo-Urquidez*,

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[18] As discussed in *Rasul v. Bush*, the nature of Guantanamo 18 remaining under "the ultimate sovereignty of the Republic of Cuba" yet at the same time under the "complete jurisdiction and control" of the United States is problematic in determining the level of rights to afford detainees. 542 U.S. at 471 (citation omitted). Because Guantanamo exists in a jurisdictional vacuum, not until *Rasul* was it clear that a district court could hear habeas petitions brought by detainees held there. Justice Kennedy in his concurrence viewed Guantanamo from "a practical perspective" stating that "the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 487 (citation omitted). In contrast, Justice Scalia in his dissent declared that Guantanamo is "beyond the territorial jurisdiction of all [U.S.] courts." *Id.* at 488. Justice Scalia added also that, although Guantanamo is under the "jurisdiction and control" of the United States, sovereignty is the threshold test for extending constitutional protections to aliens, and moreover, it is up to Congress to give jurisdiction to the courts. *Id.* at 501.

the respondent, a citizen and resident of Mexico, was arrested by Mexican police officers and transported to the United States. *Id.* at 262. Subsequently, Drug Enforcement Agency agents in concert with Mexican police officers searched his property in Mexico without a warrant. *Id.* The respondent claimed that the evidence submitted against him at trial was obtained in violation of the Fourth Amendment and should therefore be excluded. *Id.* at 263. The Court disagreed because the respondent had no previous voluntary connection with this country and his only connections arose from his brief detainment in California. *Id.* at 271. Furthermore, relying on *Eisentrager*, the Court reaffirmed its desire to avoid applying constitutional rights to aliens when it "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-74. The Court concluded that at least short term "lawful but involuntary [presence] is not of the sort to indicate any substantial connection with our country[,]" and thus, constitutional protections do not apply to searches of a non-resident alien's property abroad. *Id.* at 271. Thus, while the plaintiffs did have contact with the United States, like the respondent in *Verdugo*, that contact was limited to the detention.

At the time of the plaintiffs' detainment, both *Eisentrager* and *Verdugo-Urquidez* [19] cautioned courts from interfering with foreign activities – especially activities related to national security.

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[19] *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 201-02 (D.C. Cir. 2001) (adopting the *Verdugo-Urquidez* test in applying due process rights to a foreign terrorist organization).

Verdugo-Urquidez, 494 U.S. at 273. These cases indicate that the Constitution applies only once aliens were within the territory of the United States and developed substantial contacts in this country. *Id.* at 271. Indeed, not until the Supreme Court decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (granting Guantanamo detainees the right to counsel) and *Rasul v. Bush*, 542 U.S. 466 (2004) (granting federal courts jurisdiction to hear Guantanamo detainees' habeas petitions), both decided after the plaintiffs' release from Guantanamo, were military personnel provided their first indication that detainees may be afforded a degree of constitutional protection. These cases provide the first decisions dealing precisely with the facts and basic concerns presented here (9/11, Authorization for Use of Military Force, GTMO). The plaintiffs have provided no case law, and the court finds none, supporting a conclusion that military officials would have been aware, in light of the state of the law at the time, that detainees should be afforded the rights they now claim. Accordingly, due to the unsettled nature of Guantanamo detainees' constitutional rights in American courts, the defendants cannot be said to have been "plainly incompetent" or to have "knowingly violated the law," and therefore are entitled to qualified immunity.[20] *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (stating that "the qualified immunity

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[20] A final note, which reaffirms the court's holding today, comes from dicta in *Jifry v. Fed. Aviation Admin.*, stating, "[t]he Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." 370 F.3d 1174, 1182 (D.C. Cir. 2004).

standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law'") (internal quotations omitted).

D. The Court Defers Ruling on the Defendants' Motion to Dismiss the Plaintiffs' Religious Freedom Restoration Act Claims

The plaintiffs allege that the defendants' actions violated their free exercise rights as protected by the Religious Freedom Restoration Act ("RFRA"). Compl. ¶¶ 203-208. The defendants, however, contend that the Act does not apply extraterritorially and alternatively, that the defendants are once again entitled to qualified immunity as to this claim. Defs.' Mot. at 24-27.

"Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (stating that this "presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility") (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). In determining whether RFRA has extra-territorial application, the court looks to the legislative history.

Congress enacted RFRA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990); 42 U.S.C. § 2000bb(a)(4). As stated in § 2000bb(a)(4), that decision "virtually eliminated the requirements

that the government justify burdens on religious exercise imposed by laws neutral toward religion." *Id.* RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates a "compelling governmental interest" and uses the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1(a) - (b); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 166-68 (D.C. Cir. 2003). In *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997), the Court held the RFRA unconstitutional as applied to state action. *Id.* However, "the portion of RFRA remaining after *City of Boerne* . . . the portion . . . applicable to the federal government . . . survived the Supreme Court's decision striking down the statute as applied to the States." *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001) (" Henderson II").

The historical development of RFRA, to undo *Employment Division v. Smith*, belies any assertion that Congress intended RFRA to have extra-territorial application. The plaintiffs have not pointed to any case law persuading this court of Congress' intentions to apply the Act extraterritorially, and the court finds no such reason to do so now. Nevertheless, GTMO is a "territory over which the U.S. exercises plenary and exclusive authority." *Rasul*, 542 U.S. at 466. As Justice Scalia interpreted the majority opinion in *Rasul*, "not only § 2241 but presumably *all* United States law applies there – including, for example, the federal cause of action recognized in *Bivens*[.]" *Rasul v. Bush*, 542 U.S. at 500 (emphasis in original) (Scalia, J.,

dissenting). Based on Justice Scalia's interpretation, RFRA applies to persons detained at Guantanamo. The parties' briefing on this issue, however, is inadequate.

The defendants argue, in the alternative, that they are entitled to qualified immunity from suit for damages arising from any violation of RFRA. Defs.' Mot. at 27. The parties' briefing as to this issue is also inadequate. For this reason, the court directs the parties to submit supplemental briefing to the court on these issues within 45 days of this opinion.[21] Thus, the court defers ruling on the defendants' motion to dismiss the plaintiffs' RFRA claim.

IV. CONCLUSION

For the foregoing reasons, the court grants in part and defers ruling in part on the defendants' motion to dismiss. An order directing the parties in a manner consistent with this memorandum opinion is separately and contemporaneously issued this 6th day of February, 2006.

RICARDO M. URBINA
United States District Judge

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[21] The parties will each then have a period of 20 days within which to file responses to the supplemental briefing.

APPENDIX G

United States Court of Appeals
For the District of Columbia Circuit

September Term 2007

No. 06-5209

04cv01864

Filed On: March 26, 2008

[Entered March 26, 2008]

Shafiq Rasul, et al.,
Appellants

v.

Richard Myers, Air Force General, et al.,
Appellees

Consolidated with 06-5222

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland,* Brown, Griffith, and Kavanaugh,* Circuit Judges

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* Circuit Judges Garland and Kavanaugh did not participate in this matter

ORDER

Upon consideration of appellant/cross-appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

September Term, 2007

No. 06-5209

04cv01864

Filed On: March 26, 2008

Shafiq Rasul, et al.,
Appellants

v.

Richard Myers, Air Force General, et al.,
Appellees

Consolidated with 06-5222

BEFORE: Henderson, Randolph, and Brown, Circuit Judges

ORDER

Upon consideration of appellants/cross-appellees' petiton for rehearing filed February 25, 2008, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX H

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 2, 2008

Mr. Eric L. Lewis
Baach Robinson & Lewis PLLC
1201 F Street NW, Suite 500
Washington, DC 20004

Re: Shafiq Rasul, et al.
v. Richard Myers, et al.
Application No. 07A939

Dear Mr. Lewis,

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on June 2, 2008 extended the time to and including August 22, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
by /s/
Sandy Spagnolo
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Eric L. Lewis
Baach Robinson & Lewis PLLC
1201 F Street NW, Suite 500
Washington, DC 20004

Mr. Paul D. Clement
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Clerk
United States Court of Appeals for
the District of Columbia Circuit
333 Constitution Avenue, NW
Washington, DC 20001

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be ... deprived of life, liberty, or property, without due process of law;

U.S. Const. amend. V.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend VIII.

28 U.S.C. § 2679.
Exclusiveness of remedy

....

(d)

> (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*.

42 U.S.C. § 2000bb. Congressional findings and declaration of purposes

(a) Findings
The Congress finds that—

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes
The purposes of this chapter are—

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb–1. Free exercise of religion protected

(a) In general
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief
A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42. U.S.C. § 2000bb–2. Definitions
As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc–5 of this title.

42 U.S.C. § 2000bb–3. Applicability

(a) In general
This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction
Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected
Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. § 2000bb–4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. 106-274, 114 Stat 803 (2000) (codified at 42 U.S.C. § 2000cc, *et seq*.)

42 U.S.C. § 2000cc–5. Definitions
In this chapter:

....

(7) Religious exercise

(A) In general
The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule
The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case 1:04cv01864

SHAFIQ RASUL
c/o 14 Inverness Street
London NW1 7 HJ
England;

ASIF IQBAL
c/o 14 Inverness Street
London NW1 7 HJ
England;

RHUHEL AHMED
c/o 14 Inverness Street
London NW1 7 HJ
England; and

C.A. No.____

JAMAL AL-HARITH
c/o 159 Princess Road
Manchester M14 4RE
England

Plaintiffs

-against-

DONALD RUMSFELD
Department of Defense
1000 Defense Pentagon
Washington D.C. 20301-1000;

AIR FORCE GENERAL RICHARD MYERS
Chairman, Joint Chiefs of Staff
9999 Joint Staff Pentagon
Washington, D.C. 20318-9999;

ARMY MAJOR GENERAL GEOFFREY MILLER
Former Commander, Joint Task Force
Guantánamo Bay Naval Base, Cuba,
c/o United States Army
Army Pentagon
Washington, D.C.20310-0200;

ARMY GENERAL JAMES T. HILL
Commander, United States Southern Command
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

ARMY MAJOR GENERAL MICHAEL E. DUNLAVEY
Former Commander, Joint Task Force
Guantánamo Bay Naval Base, Cuba,
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

ARMY BRIGADIER GENERAL JAY HOOD
Commander, Joint Task Force, GTMO
Guantánamo Bay Naval Base, Cuba,
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

MARINE BRIGADIER GENERAL MICHAEL LEHNERT
Commander Joint Task Force-160
Guantánamo Bay Naval Base, Cuba
c/o Headquarters USMC
2 Navy Annex (CMC)
Washington, D.C. 20380-1775;

ARMY COLONEL NELSON J. CANNON
Commander, Camp Delta
Guantánamo Bay Naval Base, Cuba,
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

ARMY COLONEL TERRY CARRICO
Commander Camp X-Ray, Camp Delta
Guantánamo Bay Naval Base, Cuba,
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

ARMY LIEUTENANT COLONEL WILLIAM CLINE
Commander, Camp Delta
Guantánamo Bay Naval Base, Cuba,
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200;

ARMY LIEUTENANT COLONEL DIANE BEAVER
Legal Adviser to General Dunlavey
Guantánamo Bay Naval Base, Cuba
c/o United States Army
Army Pentagon
Washington, D.C. 20310-0200

and

JOHN DOES 1-100, Individuals involved in the illegal Torture of Plaintiffs at Guantánamo Bay Naval Base

All in their personal capacities

Defendants.

COMPLAINT

(Violations of the Alien Tort Statute, the Fifth and Eighth Amendments to the U.S. Constitution, the Geneva Conventions, and the Religious Freedom Restoration Act)

Plaintiffs Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed and Jamal Al-Harith, by and through their undersigned attorneys, Baach Robinson & Lewis PLLC and Michael Ratner at the Center for Constitutional Rights, as and for their complaint against Defendants Donald Rumsfeld, Air Force General Richard Myers, Army Major General Geoffrey Miller, Army General James T. Hill, Army Major General Michael E. Dunlavey, Army Brigadier General Jay Hood, Marine Brigadier General Michael Lehnert, Army Colonel Nelson J. Cannon, Army Colonel Terry Carrico, Army Lieutenant Colonel William Cline, Army Lieutenant Colonel Diane Beaver and John Does 1-100, hereby allege as follows:

INTRODUCTION

1. Plaintiffs are citizens and residents of the United Kingdom. They are not now and have never been members of any terrorist group. They have never taken up arms against the United States.

2. Plaintiffs Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed were detained in Northern Afghanistan on November 28, 2001, by General Rashid Dostum, an Uzbek warlord temporarily allied with the United States as part of the Northern Alliance. Thereafter, General Dostum placed Plaintiffs Rasul, Iqbal and Ahmed in the custody of the United States military. Because Plaintiffs Rasul, Iqbal and Ahmed were unarmed and not engaged in any hostile activities, neither General Dostum nor any of his troops ever could have or did observe them engaged in combat against the United States, the Northern Alliance or anyone else. On information and belief, General Dostum detained Plaintiffs Rasul, Iqbal and Ahmed and numerous other detainees who were not combatants; he handed detainees including Plaintiffs Rasul, Iqbal and Ahmed to the custody of the United States in order to obtain bounty money from the United States; and the United States took custody of Plaintiffs Rasul, Iqbal and Ahmed without any independent good faith basis for concluding that they were or had been engaged in activities hostile to the United States.

3. Plaintiff Jamal Al-Harith works as an internet web designer in Manchester, England. Intending to attend a religious retreat, Plaintiff Al-Harith arrived in Pakistan on October 2, 2001,

where he was advised to leave the country because of animosity toward British citizens. Heeding the warning, he planned to return to Europe by traveling overland through Iran to Turkey by truck. While in Pakistan, the truck in which Plaintiff Al-Harith was riding was stolen at gunpoint by Afghans; he was then forced into a jeep which crossed the border into Afghanistan. Plaintiff Al-Harith was then handed over to the Taliban. Plaintiff Al-Harith was beaten by Taliban guards and taken for interrogation. He was accused of being a British special forces military spy and held in isolation. After the US invasion of Afghanistan, the Taliban released Plaintiff Al-Harith into the general prison population. When the Taliban government fell and the new government came to power, Plaintiff Al-Harith and others in the prison were told that they were free to leave and Plaintiff Al-Harith was offered transportation to Pakistan. Plaintiff Al-Harith thought it would be quicker and easier to travel to Kabul where there was a British Embassy. Officials of the International Committee of the Red Cross ("ICRC") instructed Al-Harith to remain at the prison and they offered to make contact with the British Embassy to fly him home. Plaintiff Al-Harith also spoke directly to British Embassy officials who indicated that they were making arrangements to fly him to Kabul and out of the country. After Plaintiff Al-Harith had been in contact with the British Embassy in Kabul for approximately a month discussing the logistics of evacuating him, American Special Forces arrived and questioned Plaintiff. The ICRC told Plaintiff Al-Harith that the Americans would fly Plaintiff Al-Harith to Kabul; two days before he was scheduled

to fly to Kabul, American soldiers told Plaintiff Al-Harith, "You're not going anywhere. We're taking you to Kandahar airbase."

4. All four Plaintiffs were first held in United States custody in Afghanistan and later transported to the United States Naval Base at Guantánamo Bay Naval Station, Cuba ("Guantánamo"), where Defendants imprisoned them without charge for more than two years. During Plaintiffs' imprisonment, Defendants systematically and repeatedly tortured them in violation of the United States Constitution and domestic and international law, and deprived them of access to friends, relatives, courts and counsel. Defendants repeatedly attempted to extract confessions from Plaintiffs without regard to the truth or plausibility of these statements through the use of the illegal methods detailed below.

5. Plaintiffs were released without charge in March 2004 and have returned to their homes in the United Kingdom where they continue to suffer the physical and psychological effects of their prolonged arbitrary detention, torture and other mistreatment as hereinafter alleged.

6. In the course of their detention by the United States, Plaintiffs were repeatedly struck with rifle butts, punched, kicked and slapped. They were "short shackled" in painful "stress positions" for many hours at a time, causing deep flesh wounds and permanent scarring. Plaintiffs were also threatened with unmuzzled dogs, forced to strip naked, subjected to repeated forced body cavity

searches, intentionally subjected to extremes of heat and cold for the purpose of causing suffering, kept in filthy cages for 24 hours per day with no exercise or sanitation, denied access to necessary medical care, harassed in practicing their religion, deprived of adequate food, deprived of sleep, deprived of communication with family and friends, and deprived of information about their status.

7. Plaintiffs' detention and mistreatment were in plain violation of the United States Constitution, federal statutory law and United States treaty obligations, and customary international law. Defendants' treatment of Plaintiffs and other Guantánamo detainees violated various provisions of law including the Fifth Amendment to the United States Constitution forbidding the deprivation of liberty without due process; the Eighth Amendment forbidding cruel and unusual punishment; United States statutes prohibiting torture, assault, and other mistreatment; the Geneva Conventions; and customary international law norms prohibiting torture and other cruel, inhuman or degrading treatment.

8. Plaintiffs' torture and other mistreatment was not simply the product of isolated or rogue actions by individual military personnel. Rather it was the result of deliberate and foreseeable action taken by Defendant Rumsfeld and senior officers to flout or evade the United States Constitution, federal statutory law, United States treaty obligations and long established norms of customary international law. This action was taken in a misconceived and illegal attempt to utilize

torture and other cruel, inhuman, or degrading acts to coerce nonexistent information regarding terrorism. It was misconceived because, according to the conclusion of the US military as expressed in the Army Field Manual, torture does not yield reliable information, and because Plaintiffs—along with the vast majority of Guantánamo detainees—had no information to give. It was illegal because, as Defendants well knew, torture and other cruel, inhuman or degrading treatment of detainees is not permitted under the United States Constitution, federal statutory law, United States treaty obligations, and customary international law.

9. On or about December 2, 2002, Defendant Rumsfeld signed a memorandum approving numerous illegal interrogation methods, including putting detainees in "stress positions" for up to four hours; forcing detainees to strip naked, intimidating detainees with dogs, interrogating them for 20 hours at a time, forcing them to wear hoods, shaving their heads and beards, keeping them in total darkness and silence, and using what was euphemistically called "mild, non-injurious physical contact." As Defendant Rumsfeld knew, these and other methods were in violation of the United States Constitution, federal statutory law, the Geneva Conventions, and customary international law as reflected in, *inter alia,* the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). This memorandum of December 2, 2002, authorizing torture and other mistreatment, was originally designated by Defendant Rumsfeld to be classified for ten years but was released at the

direction of President George W. Bush after the Abu Ghraib torture scandal became public.

10. After authorizing, encouraging, permitting, and requiring the acts of torture and other mistreatment inflicted upon Plaintiffs, Defendant Rumsfeld, on information and belief, subsequently commissioned a "Working Group Report" dated March 6, 2003, to address "Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations." This report, also originally classified for a period of ten years by Defendant Rumsfeld, was also released after the Abu Ghraib torture scandal became public. This report details the requirements of international and domestic law governing interrogations, including the Geneva Conventions; the CAT; customary international law; the torture statute, 18 U.S.C. § 2340; assault within maritime and territorial jurisdiction, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; murder, 18 U.S.C. § 1111; manslaughter, 18 U.S.C. § 1112; interstate stalking, 18 U.S.C. § 2261a; and conspiracy 18 U.S.C. § 2 and § 371. The report attempts to address "legal doctrines under the Federal Criminal Law that could render specific conduct, otherwise criminal *not* unlawful." Working Group Report at p. 3 (emphasis in original). The memorandum is on its face an ex post facto attempt to create arguments that the facially criminal acts perpetuated by the Defendants were somehow justified. It argues first that the President as Commander-in-Chief has plenary authority to order torture, a proposition that ignores settled legal doctrine from King John at Runnymede to

Youngstown Sheet & Tube, 343 U.S. 579 (1952). It next tries to apply common law doctrines of self-defense and necessity, arguing the erroneous proposition that the United States has the right to torture detained individuals because it needs to defend itself or because it is necessary that it do so. Finally, it suggests that persons inflicting torture and other mistreatment will be able to defend against criminal charges by claiming that they were following orders. The report asserts that the detainees have no Constitutional rights because the Constitution does not apply to persons held at Guantánamo. However, the report acknowledges that U.S. criminal laws do apply to Guantánamo, and further acknowledges that the United States is bound by the CAT to the extent that conduct barred by that Convention would also be prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution. On June 22, 2004, the conclusions of this report and other memoranda attempting to justify torture were repudiated and rescinded by President Bush.

11. In April 2003, following receipt of the Working Group Report, Defendant Rumsfeld issued a new set of recommended interrogation techniques, requiring approval for four techniques. These recommendations recognized specifically that certain of the approved techniques violated the Geneva Conventions and customary international law, including the use of intimidation, removal of religious items, threats and isolation. The April 2003 report, however, officially withdrew approval for unlawful actions that had been ongoing for months, including hooding, forced nakedness,

shaving, stress positions, use of dogs and "mild, non-injurious physical contact." Nevertheless, on information and belief these illegal practices continued to be employed against Plaintiffs and other detainees at Guantánamo.

12. Defendants well knew that their activities resulting in the detention, torture and other mistreatment of Plaintiffs were illegal and violated clearly established law —i.e., the Constitution, federal statutory law and treaty obligations of the United States and customary international law. Defendants' after-the-fact attempt to create an Orwellian legal façade makes clear their conscious awareness that they were acting illegally. Therefore they cannot claim immunity from civil liability.

JURISDICTION AND VENUE

13. This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331 (federal question jurisdiction); and 28 U.S.C. §1350 (Alien Tort Statute).

14. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(3) and 28 U.S.C. § 1391(b)(2). The alleged acts described below are "inextricably bound up with the District of Columbia in its role as the nation's capital." *Mundy v. Weinberger*, 554 F. Supp. 811, 818 (D.D.C. 1982). Decisions and acts by Defendants ordering, facilitating, aiding and abetting, acquiescing, confirming and/or conspiring in the commission of the alleged acts reached the highest levels of the

United States Government. On information and belief, approval for all alleged acts emanated under color of law from orders, approvals, and omissions occurring in the Pentagon, numerous government agencies headquartered in the District of Columbia, and the offices of Defendant Rumsfeld, several of which are in the District of Columbia. Venue for claims arising from acts of Cabinet officials, the Secretary of Defense and United States agencies lies in the District of Columbia. *See id.; Smith v. Dalton*, 927 F. Supp. 1 (D.D.C. 1996).

PARTIES

15. Plaintiff Shafiq Rasul was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up arms against the United States. At the time of his initial arrest and detention, he was 24 years old.

16. Plaintiff Asif Iqbal was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up arms against the United States. At the time of his initial arrest and detention, he was 20 years old.

17. Plaintiff Rhuhel Ahmed was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up

arms against the United States. At the time of his initial arrest and detention, he was 19 years old.

18. Plaintiff Jamal Al-Harith was born in the United Kingdom and has been at all times relevant hereto a citizen and resident of the United Kingdom. He is not now and has never been a terrorist or a member of a terrorist group. He has never taken up arms against the United States. At the time of his initial arrest and detention, he was 35 years old.

19. Defendant Donald Rumsfeld is the United States Secretary of Defense. On information and belief, he is a citizen of Illinois and a resident of the District of Columbia. Defendant Rumsfeld is charged with maintaining the custody and control of the Guantánamo detainees, including Plaintiffs, and with assuring that their treatment was in accordance with law. Defendant Rumsfeld ordered, authorized, condoned and has legal responsibility for the arbitrary detention, torture and other mistreatment of Plaintiffs as alleged herein. Defendant Rumsfeld is sued in his individual capacity.

20. Defendant Myers is a General in the United States Air Force and was at times relevant hereto Chairman of the Joint Chiefs of Staff. On information and belief, he is a citizen and resident of Virginia. As the senior uniformed military officer in the chain of command, Defendant Myers is charged with maintaining the custody and control of the Guantánamo detainees, including Plaintiffs, and with assuring that their treatment was in

accordance with law. On information and belief, Defendant Myers was informed of torture and other mistreatment of detainees at Guantánamo and Abu Ghraib prison in Iraq and condoned such activities. Defendant Myers was in regular contact with Defendant Rumsfeld and participated in and implemented decisions taken in the District of Columbia. Defendant Myers is sued in his individual capacity.

21. Defendant Miller is a Major General in the United States Army and was at times relevant hereto Commander of Joint Task Force-GTMO. On information and belief, he is a citizen and resident of Texas. At times relevant hereto, he had supervisory responsibility for Guantánamo detainees, including Plaintiffs, and was responsible for assuring that their treatment was in accordance with law. On information and belief, Defendant Miller was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. On information and belief, Defendant Miller implemented and condoned numerous methods of torture and other mistreatment as hereinafter described. On information and belief, Defendant Miller was subsequently transferred to Abu Ghraib where he implemented and facilitated torture and other mistreatment of detainees there. These acts were filmed and photographed and have justly inspired widespread revulsion and condemnation around the world. Defendant Miller is sued in his individual capacity.

22. Defendant Hill is a General in the United States Army and was at times relevant hereto Commander of the United States Southern Command. On information and belief, he is a citizen and resident of Texas. On information and belief, Defendant Hill was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. On information and belief, General Hill requested and recommended approval for several abusive interrogation techniques which were used on Guantánamo detainees, including Plaintiffs. Defendant Hill is sued in his individuals capacity.

23. Defendant Dunlavey is a Major General in the United States Army and was at times relevant hereto Commander of Joint Task Forces 160/170, the successors to Joint Task Force-GTMO. On information and belief, he is a citizen and resident of Pennsylvania. At times relevant hereto, he had supervisory responsibility for Guantánamo detainees, including Plaintiffs, and for assuring that their treatment was in accordance with law. On information and belief, Defendant Dunlavey was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. On information and belief, Major General Dunlavey implemented and condoned the torture and other cruel, inhuman or degrading acts and conditions alleged herein. Defendant Dunlavey is sued in his individual capacity.

24. Defendant Hood is a Brigadier General in the United States Army and is the Commander of Joint Task Force-GTMO, which at all relevant times operated the detention facilities at Guantánamo. On information and belief, he is a citizen and resident of South Carolina. At times relevant hereto, he had supervisory responsibility for Guantánamo detainees, including Plaintiffs, and for assuring that their treatment was in accordance with law. On information and belief, Defendant Hood has been and continues to be in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Hood is sued in his individual capacity.

25. Defendant Lehnert is a Brigadier General in the United States Marine Corps and was at times relevant hereto Commander of the Joint Task Force responsible for the construction and operation of Camp X-Ray and Camp Delta at Guantánamo. On information and belief, he is a citizen and resident of Florida. At times relevant hereto, he had supervisory responsibility for Guantánamo detainees, including Plaintiffs, and for assuring that their treatment was in accordance with law. On information and belief, Defendant Lehnert was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Lehnert is sued in his individual capacity.

26. Defendant Cannon is a Colonel in the United States Army and the Commander of Camp Delta at Guantánamo. On information and belief, he is a citizen and resident of Michigan. At times relevant hereto, he has and continues to have supervisory responsibility for Guantánamo detainees including Plaintiffs and for assuring that their treatment was in accordance with law. On information and belief, Defendant Cannon has been in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Cannon is sued in his individual capacity.

27. Defendant Carrico is a Colonel in the United States Army and was at times relevant hereto Commander of Camp X-Ray and Camp Delta at Guantánamo. On information and belief, he is a citizen and resident of Texas. At times relevant hereto, he had supervisory responsibility for Guantánamo detainees including Plaintiffs and for assuring that their treatment was in accordance with law. On information and belief, Defendant Carrico was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Carrico is sued in his individual capacity.

28. Defendant Beaver is a Lieutenant Colonel in the United States Army and was at times relevant hereto Chief Legal Adviser to Defendant

Dunlavey. On information and belief, she is a citizen and resident of Kansas. On information and belief, knowing that torture and other mistreatment were contrary to military law and regulations, she nevertheless provided an opinion purporting to justify the ongoing torture and other mistreatment of detainees at Guantánamo, including Plaintiffs. On information and belief, Defendant Beaver was in regular contact with Defendant Rumsfeld and other senior officials in the chain of command based in the District of Columbia and participated in and implemented decisions taken in the District of Columbia. Defendant Beaver is sued in her individual capacity.

29. Plaintiffs do not know the true names and capacities of other Defendants sued herein and therefore sue these defendants by fictitious names, John Does 1-100. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. John Does 1-100 are the military and civilian personnel who participated in the torture and other mistreatment of Plaintiffs as hereinafter alleged.

FACTUAL ALLEGATIONS

30. Plaintiffs are citizens and residents of the United Kingdom.

31. Plaintiffs Rasul, Iqbal and Ahmed are boyhood friends and grew up streets away from each other in the working-class town of Tipton in the West Midlands of England.

32. Plaintiff Shafiq Rasul attended a Catholic elementary school before studying at the same high school as Plaintiffs Iqbal and Ahmed. An avid soccer fan, Plaintiff Rasul played for a local team before going on to study computer science at the University of Central England. He also worked part time at an electronics store.

33. Plaintiff Asif Iqbal attended the same elementary school as Plaintiff Rasul and the same high school as both Plaintiffs Rasul and Ahmed. After leaving high school, Plaintiff Iqbal worked at a local factory making road signs and building bus shelters. He was also an active soccer player and volunteered at the local community center.

34. Plaintiff Rhuhel Ahmed attended the same high school as Plaintiffs Iqbal and Ahmed. Like Plaintiff Iqbal, he worked at a local factory and worked with children and disabled people at the local government-funded Tipton Muslim Community Center.

35. In September 2001, Plaintiff Iqbal traveled to Pakistan to join his father who had arranged a marriage for him with a young woman from his family's ancestral village. His longtime friend, Plaintiff Ahmed traveled from England in October in order to join him at his wedding as his best man. Plaintiff Rasul was at the same time in Pakistan visiting his family with the expectation of continuing his degree course in computer science degree within the month. Prior to the wedding in Pakistan, in October 2001, Plaintiffs Rasul, Iqbal and Ahmed crossed the border into Afghanistan in

order to offer help in the ongoing humanitarian crisis. After the bombing in Afghanistan began, Plaintiffs Rasul, Iqbal and Ahmed tried to return to Pakistan but were unable to do so because the border had been closed. Plaintiffs never engaged in any terrorist activity or took up arms against the United States.

36. Plaintiffs Rasul, Iqbal and Ahmed never engaged in combat against the forces of the United States or any other entity. Plaintiffs Rasul, Iqbal and Ahmed never conducted any terrorist activity or conspired, intended, or planned to conduct any such activity. Plaintiffs Rasul, Iqbal and Ahmed never belonged to Al Qaeda or any other terrorist organization.

Detention in Afghanistan

37. On November 28, 2001, Plaintiffs Rasul, Iqbal and Ahmed were captured and detained by forces loyal to General Rashid Dostum, an Uzbek warlord who was aligned with the United States.

38. No U.S. forces were present when Plaintiffs Rasul, Iqbal and Ahmed were detained. Therefore, no U.S. forces could have had any information regarding Plaintiffs other than that supplied by the forces of General Dostum, who were known to be unreliable and who were receiving a per head bounty of, on information and belief, up to $ 35,000.

39. With U.S. military forces present, Plaintiffs Rasul, Iqbal and Ahmed, along with 200 to

300 others, were crammed into metal containers and transported by truck to Sherbegan prison in Northern Afghanistan. General Dostum's forces fired holes into the sides of the containers with machine guns, striking the persons inside. Plaintiff Iqbal was struck in his arm, which would later become infected. Following the nearly 18-hour journey to Sherbegan prison, Plaintiffs Rasul, Iqbal and Ahmed were among what they estimate to have been approximately 20 survivors in the container.

40. Plaintiffs Rasul, Iqbal and Ahmed were held in Sherbegan by General Dostum's forces for about one month, where they were exposed to extremely cold conditions without adequate clothing, confined to tight spaces, and forced to ration food. Prison conditions were filthy. Plaintiffs Rasul, Iqbal and Ahmed and other prisoners suffered from amoebic dysentery and were infested with lice.

41. In late December 2001, the ICRC visited with Plaintiffs Rasul, Iqbal and Ahmed and informed them that the British Embassy in Islamabad, Pakistan had been advised of their situation and that embassy officials would soon be in contact with Plaintiffs.

42. On December 28, 2001, U.S. Special Forces arrived at Sherbegan and were informed of the identities of Plaintiffs Rasul, Iqbal and Ahmed.

43. General Dostum's troops chained Plaintiffs Rasul, Iqbal and Ahmed and marched them through the main gate of the prison, where U.S. Special Forces surrounded them at gunpoint.

44. From December 28, 2001 until their release in March 2004, Plaintiffs Rasul, Iqbal and Ahmed were in the exclusive physical custody and control of the United States military. In freezing temperatures, Plaintiffs Rasul, Iqbal and Ahmed were stripped of their clothes, searched, and photographed naked while being held by Defendant John Does, two U.S. Special Forces soldiers. American military personnel took Plaintiffs Rasul, Iqbal and Ahmed to a room for individual interrogations. Plaintiff Rasul was bound hand and foot with plastic cuffs and forced onto his knees before an American soldier in uniform. Both Plaintiffs Rasul and Iqbal were interrogated immediately and without knowledge of their interrogators' identities. Both were questioned at gunpoint. While Plaintiff Iqbal was interrogated, Defendant John Doe held a 9mm pistol physically touching his temple. At no time were Plaintiffs Rasul, Iqbal and Ahmed afforded counsel or given the opportunity to contact their families.

45. Following their interrogations, Plaintiffs Rasul, Iqbal and Ahmed were led outside where a Defendant John Doe immediately covered their eyes by putting sandbags over their heads and applying thick masking tape. They were placed side-by-side, barefoot in freezing temperatures, with only light clothing, for at least three to four hours. While hooded and taped, Plaintiffs Rasul, Iqbal and Ahmed were repeatedly threatened with beatings and death and were beaten by a number of Defendant John Does, U.S. military personnel. Plaintiff Iqbal estimates that he was punched, kicked, slapped, and

struck by US military personnel with rifle butts at least 30 or 40 times.

46. Thereafter, Plaintiffs Rasul, Iqbal and Ahmed were placed in trucks with other detainees and transported to an airport about 45 minutes away.

47. Plaintiffs Rasul and Iqbal were led onto one plane and Plaintiff Ahmed was led onto a second plane. Plaintiffs Rasul, Iqbal and Ahmed, still hooded with their hands tied behind their backs and their legs tied in plastic cuffs, were fastened to a metal belt attached to the floor of each aircraft. The soldiers instructed Plaintiffs Rasul, Iqbal and Ahmed to keep their legs straight out in front of them as they sat. The position was extremely painful. When any of Plaintiffs or other detainees tried to move to relieve the pain, an unknown number of Defendant John Does struck Plaintiffs and others with rifle butts. Plaintiffs Rasul, Iqbal and Ahmed were flown by the U.S. military to Kandahar.

48. Upon arrival in Kandahar, Plaintiffs Rasul, Iqbal and Ahmed, still covered with hoods, were led out of the planes. A rope was tightly tied around each of their right arms, connecting the detainees together.

49. Plaintiffs Rasul, Iqbal and Ahmed, who were still without shoes, were forced to walk for nearly an hour in the freezing cold, causing them to sustain deep cuts on their feet and rope burns on their right arms.

50. Plaintiffs Rasul, Iqbal and Ahmed were herded into a tent, where soldiers forced them to kneel with their legs bent double and their foreheads touching the ground. With their hands and feet still tied, the position was difficult to maintain. Plaintiffs Rasul, Iqbal and Ahmed were repeatedly and violently beaten by Defendant John Does, US soldiers. Each was asked whether he was a member of Al Qaeda and when each responded negatively, each was punched violently and repeatedly by soldiers. When Plaintiffs Rasul Iqbal and Ahmed identified themselves as British nationals, Defendants John Doe soldiers insisted they were "not white" but "black" and accordingly could not be British. The soldiers continued to beat them.

51. Plaintiffs Rasul, Iqbal and Ahmed were "processed" by American soldiers, and had plastic numbered wristbands placed on their wrists. Soldiers kicked Plaintiff Rasul, assigned the number 78, several times during this process. American soldiers cut off his clothes and conducted a body cavity search. He was then led through an open-air maze constructed of barbed wire. Plaintiffs Iqbal, assigned number 79, and Ahmed, assigned number 102, experienced the same inhumane treatment.

52. Plaintiffs Rasul, Iqbal and Ahmed, dehydrated, exhausted, disoriented, and fearful, were summoned by number for interrogation. When called, each was shackled and led to an interrogation tent. Their hoods were removed and they were told to sit on the floor. An armed soldier stood behind them out of their line of sight. They were told that if they moved they would be shot.

53. After answering questions as to their backgrounds, Plaintiffs Rasul, Iqbal and Ahmed were each photographed by soldiers. They were fingerprinted and a swab from their mouth and hairs plucked from their beards were taken for DNA identification.

54. An American soldier questioned Plaintiff Iqbal a second time. Plaintiff Iqbal was falsely accused by the interrogator of being a member of Al Qaeda. Defendant John Does, US soldiers, punched and kicked Plaintiff Iqbal in the back and stomach before he was dragged to another tent.

55. Personnel believed by Plaintiffs to be British military personnel later interrogated Plaintiffs Rasul, Iqbal and Ahmed, with US soldiers present. Plaintiffs Rasul, Iqbal and Ahmed were falsely accused of being members of the Al Muhajeroon. During the interrogation, Plaintiffs Rasul, Iqbal and Ahmed were threatened by Defendant John Does, armed American soldiers, with further beatings if they did not admit to various false statements.

56. Plaintiffs Rasul and Ahmed slept in a tent with about 20 other detainees. Plaintiff Iqbal was in another tent. The tents were surrounded by barbed wire. Detainees were not allowed to talk and were forced to sleep on the ground. American soldiers woke the detainees hourly as part of a systematic effort to deprive them of sleep.

57. Defendant John Does, interrogators and guards, frequently used physical violence and unmuzzled dogs to threaten and intimidate Plaintiffs Rasul, Iqbal and Ahmed and other detainees during the interrogations.

58. At or around midnight of January 12 or 13, 2002, US army personnel entered the tent of Plaintiffs Rasul and Ahmed. Both were made to lie on the ground, were shackled, and rice sacks were placed over their heads. They were led to another tent, where Defendant John Does, US soldiers, removed their clothes and forcibly shaved their beards and heads. The forced shaving was not intended for hygiene purposes, but rather was, on information and belief, designed to distress and humiliate Plaintiffs given their Muslim faith, which requires adult males to maintain beards.

59. Plaintiff Rasul was eventually taken outside where he could hear dogs barking nearby and soldiers shouting, "Get 'em boy." He was then given a cavity search and photographed extensively while naked before being given an orange uniform. Soldiers handcuffed Plaintiff Rasul's wrists and ankles before dressing him in black thermal gloves, dark goggles, earmuffs, and a facemask. Plaintiff Rasul was then left outside for hours in freezing temperatures.

60. Plaintiff Iqbal, who was in another tent, experienced similar treatment of being led from his tent to be shaved and stripped naked.

61. Plaintiffs Rasul and Iqbal were escorted onto large cargo planes. Still shackled and wearing facemasks, both were chained to the floor with no backrests. They were forced by Defendant John Does to sit in an uncomfortable position for the entire flight to Guantánamo (of approximately eighteen to twenty hours) and were not allowed to move or given access to toilet facilities.

62. Plaintiff Ahmed remained in Kandahar for another month. American soldiers interrogated him four more times. Sleep-deprived and malnourished, Plaintiff Ahmed was also interrogated by British agents who, on information and belief were from the British intelligence agency, MI5, and he was falsely told that Plaintiffs Rasul and Iqbal had confessed in Cuba to allegations of membership in the Al Muhajeroon. He was told that he could return to the United Kingdom in exchange for admitting to various accusations. Distraught, fearful of further beatings and abuse, and without benefit of contact with family or counsel, Plaintiff Ahmed made various false confessions. Plaintiff Ahmed was thereafter transported to Guantánamo.

63. As noted above, Plaintiff Al-Harith was being held in custody by the Taliban in Southern Afghanistan as a suspected British spy. He was interrogated and beaten by Taliban troops. When the Taliban government fell, Plaintiff Al-Harith was in a Taliban prison. He contacted the British Embassy through the ICRC and by satellite phone and was assured he would be repatriated to Britain. Two days before his scheduled repatriation, US forces informed him that he was being detained

and taken to Kandahar, where he was held in a prison controlled by US forces and interrogated and beaten by US troops. Plaintiff Al-Harith was flown to Guantánamo from Kandahar on or about February 11, 2002.

64. Prior to take-off, Plaintiff Al-Harith, like Plaintiffs Rasul, Iqbal and Ahmed, was hooded and shackled; mittens were placed on his hands and earphones over his ears. Chains were then placed around his legs, waist and the earphones. The chains cut into his ears. Goggles were placed on his eyes and a medical patch that, on information and belief, contained muscle relaxant was applied.

Captivity and Conditions at Camp X-Ray, Guantánamo

65. Plaintiffs Rasul and Iqbal were transported to Guantánamo in mid-January 2002. Plaintiffs Ahmed and Al-Harith were transported there approximately one month later. During the trip, Defendant John Does, US soldiers, kicked and punched Plaintiff Ahmed more than twenty times. Plaintiff Al-Harith was punched, kicked and elbowed repeatedly and was threatened with more violence.

66. Upon arrival at Guantánamo, Plaintiffs were placed on a barge to get to the main camp. Defendant John Does, US Marines on the barge, repeatedly beat all the detainees, including Plaintiffs, kicking, slapping, elbowing and punching detainees in the body and head. The Marines announced repeatedly, "You are arriving at your

final destination," and, "You are now property of the United States Marine Corps."

67. Plaintiffs were taken to Camp X-Ray, the prison camp for detainees. Soldiers forced all four Plaintiffs on arrival to squat outside in stress positions in the extreme heat. Plaintiffs and the other detainees had their goggles and hoods removed, but they had to remain with their eyes closed and were not allowed to speak.

68. Plaintiff Iqbal, still shackled and goggled, fell over and started shaking. Plaintiff Iqbal was then given a cavity search and transported to another area for processing, including fingerprinting, DNA sampling, photographs, and another wristband.

69. Plaintiff Rasul was forced to squat outside for six to seven hours and went through similar processing. Unmuzzled barking dogs were used to intimidate Plaintiff Rasul and others. At one point, Defendant John Doe, a soldier from a unit known as the Extreme Reaction Force (ERF), repeatedly kicked Plaintiff Rasul in the back and used a riot shield to slam him against a wall.

70. After processing, Plaintiffs were placed in wire cages of about 2 meters by 2 meters. Conditions were cruel, inhuman and degrading.

71. Plaintiffs were forced to sit in their cells in total silence for extended periods. Once a week, for two minutes, Plaintiffs were removed from their cells and showered. They were then returned to

their cells. Once a week, Plaintiffs were permitted five minutes recreation while their hands remained chained.

72. Plaintiffs were exposed to extreme heat during the day, as their cells were situated in the direct sunlight.

73. Plaintiffs were deliberately fed inadequate quantities of food, keeping them in a perpetual state of hunger. Much of the food consisted of "MRE's" (meals ready to eat), which were ten to twelve years beyond their usable date. Plaintiffs were served out of date powdered eggs and milk, stale bread from which the mold had been picked out and fruit that was black and rotten.

74. Plaintiffs and other detainees were forced to kneel each time a guard came into their cells.

75. Plaintiffs at night were exposed to powerful floodlights, a purposeful tactic to promote sleep deprivation among the detainees. Plaintiffs and the other detainees were prohibited from putting covers over their heads to block out the light and were prohibited from keeping their arms beneath the covers.

76. Plaintiffs were constantly threatened at Camp X-Ray, with guards stating on multiple occasions, "We could kill you at any time; the world doesn't know you're here; we could kill you and no one would know."

77. Plaintiff Al-Harith was taken to the medical clinic and was told that his blood pressure was too high. He was given, on information and belief, muscle relaxant pills and an injection of an unspecified substance.

78. On various occasions, Plaintiffs' efforts to pray were banned or interrupted. Plaintiffs were never given prayer mats and did not initially receive copies of the Koran. Korans were provided to them after approximately a month. On one occasion, a guard in Plaintiff Ahmed's cellblock noticed a copy of the Koran on the floor and kicked it. On another occasion, a guard threw a copy of the Koran in a toilet bucket. Detainees, including Plaintiffs, were also at times prevented from calling out the call to prayer, with American soldiers either silencing the person who was issuing the prayer call or playing loud music to drown out the call to prayer. This was part of a continuing pattern of disrespect and contempt for Plaintiffs' religious beliefs and practices.

Interrogation at Camp X-Ray

79. Plaintiffs were extensively interrogated at Camp X-Ray.

80. During interrogations, Plaintiffs were typically "long shackled," whereby their legs were chained using a large padlock. The shackles had sharp edges that scraped the skin, and all Plaintiffs experienced deep cuts on and around their ankles, resulting in scarring and continuing chronic pain. During the interrogations, Plaintiffs were shackled

and chained to the floor. Plaintiffs were repeatedly urged by American interrogators to admit that they were fighters who went to Afghanistan for "jihad." In return, Plaintiffs were promised that if they confessed to these false assertions, they could return to the United Kingdom. Plaintiff Iqbal, who was interrogated five times by American forces over three months at Camp X-Ray, was repeatedly encouraged and coerced to admit to having been a "fighter."

81. Plaintiff Al-Harith was interrogated approximately ten times at Camp X-Ray. He was interrogated by both British and American authorities. On one occasion, an interrogator asked Plaintiff Al-Harith to admit that he went to Pakistan to buy drugs, which was not true. On another occasion, Plaintiff Al-Harith was told that there was a new terrorism law that would permit the authorities to put his family out in the street if Plaintiff Al-Harith did not admit to being a drug dealer or a fighter. On another occasion, interrogators promised money, a car, a house and a job if he admitted those things. As they were not true, he declined to admit them.

82. Following Plaintiff Ahmed's first several interrogations at Camp X-Ray, he was isolated in a cellblock where there were only Arabic speakers. Plaintiff Ahmed, who does not speak Arabic, was unable to communicate with anyone other than interrogators and guards for approximately five months.

Conditions at Camp Delta

83. Around May 2002, Plaintiffs were transferred to Camp Delta.

84. At no time were Plaintiffs advised as to why they were being transferred, for what purpose they were detained, why they were considered "unlawful combatants," and what medical and legal resources might be available.

85. At Camp Delta, Plaintiffs were housed in mesh cages that were subdivided from a larger metal container. There was little to no privacy and the cages provided little shelter from the heat during the day or the cold at night. The cages quickly rusted because of the sea air. The cells contained metal slabs at waist height; detainees could not sit on the slabs because their legs would dangle off and become numb. There was not enough room in the cells to pray.

86. Constant reconstruction work and large electric generators, which ran 24 hours a day, were used as part of a strategic effort to deprive Plaintiffs and others of sleep. Lights were often left on 24 hours a day.

87. Plaintiffs Rasul and Iqbal were in the same cellblock. Plaintiff Ahmed was placed in isolation for about one month. There was no explanation given as to why Plaintiff Ahmed had been placed in isolation. Following this period, he was placed in a different cell and interrogated by

mostly American interrogators who repeatedly asked him the same questions for six months.

88. After six months at Camp Delta, Plaintiff Ahmed was moved to a cell directly opposite Plaintiff Rasul. Plaintiff Iqbal was placed in isolation for about one month. Again, no explanation was given for the arbitrary placement in isolation.

89. Plaintiff Ahmed was repeatedly disciplined with periods of isolation for such behavior as complaining about the food and singing.

90. Plaintiff Iqbal, after about one month at Camp Delta, was moved to isolation and given smaller food portions because it was believed he was belittling a military policeman. He was disciplined with another week of isolation when he wrote "have a nice day" on a Styrofoam cup.

91. After his last period of isolation, Plaintiff Iqbal was moved to a block which housed only Chinese-speaking detainees. During his time there, he was exposed to aggressive interrogation. After being there for months, Plaintiff Iqbal's mental condition deteriorated further.

92. Plaintiff Al-Harith was put into isolation for refusing to wear a wristband. Plaintiff Al-Harith was also placed in isolation for writing the letter "D" on a Styrofoam cup. The isolation block was freezing cold as cold air was blown through the block twenty-four hours a day. The isolation cell was pitch black as the guards claimed the lights were not working. Plaintiff Al-Harith was placed in isolation

a second time around Christmas 2002 for refusing to take an unspecified injection. When he refused, the ERF was brought in and Plaintiff Al-Harith was "ERFed": he was beaten, forcibly injected and chained in a hogtied position, with his stomach on the floor and his arms and legs chained together above him. The ERF team jumped on his legs and back and kicked and punched Plaintiff Al-Harith. Plaintiff Al-Harith was then placed in isolation for approximately a month, deprived at various intervals of soap, toothpaste or a toothbrush, blankets or toilet paper. He was also deprived of a Koran during this second period of isolation.

93. On information and belief, "ERFings," i.e., the savage beatings administered by the ERF teams, were videotaped on a regular basis and should be available as evidence of the truth of the allegations contained herein.

94. The Camp Delta routine included compulsory "recreation" twice a week for fifteen minutes. Attendance was enforced by the ERF. As soon as fifteen minutes had passed, detainees were immediately returned to their cells. Plaintiff Rasul noted that one would be forced to return to his cell even if in the middle of prayers.

95. Around August 2002, medical corps personnel offered Plaintiffs Rasul, Iqbal and Ahmed injections of an unidentified substance. Plaintiffs Rasul, Iqbal and Ahmed, like most detainees, refused. Soon after, Defendant John Does, the medical corps, returned with the ERF team. The ERF team members were dressed in padded gear,

thick gloves, and helmets. Plaintiffs Rasul, Iqbal and Ahmed were shackled and restrained with their arms and legs bent backwards while medical corps pulled up their sleeves to inject their arms with an unidentified drug that had sedative effects.

96. Plaintiffs Rasul, Iqbal and Ahmed received these injections against their will on approximately a dozen occasions. Plaintiff Al-Harith received 9 or 10 compulsory injections on six separate occasions.

97. Plaintiff Iqbal was deprived of his Koran and other possessions. His hands were shackled in front of him. When Plaintiff Iqbal looked back, a guard pushed him in the corner. There Defendant John Does punched him repeatedly in the face and kneed him in his thigh.

Isolation and Interrogations at Camp Delta

98. Interrogation booths either had a miniature camera hidden in them or a one-way glass window. Thus, on information and belief, some or all of the interrogations of Plaintiffs and other detainees are recorded and are available as evidence of the truth of Plaintiffs' allegations herein.

99. In December 2002, a tiered reward system was introduced at Camp Delta, whereby detainees were placed on different levels or tiers depending on their level of co-operation and their behavior at the camp.

100. Interrogators and guards frequently promised to provide or threatened to withdraw of essential items such as blankets or toothpaste – referred to as "comfort items" – in order to coerce detainees into providing information. The truthful assertion that Plaintiffs had no information to give did not result in the provision of "comfort items." To the contrary, the interrogators demanded that the Plaintiffs confess to false allegations and promised "comfort items" in exchange.

101. Isolation of detainees was frequently used as a technique to "wear down" detainees prior to interrogation. There were two primary ways in which prisoners would be placed in isolation: (1) for punishment, for a set period of time for a specific reason; or (2) for interrogation, with no specific time limit.

102. Between October 2002 and May 2003, Plaintiff Rasul was interrogated about five or six times. Most of the interrogations involved the same questions that had been asked before. In April 2003, Plaintiffs Rasul and Iqbal were given polygraph tests and were led to believe that they might be allowed to return home if they passed.

103. After two hours of questioning as to whether he was a member of Al Qaeda, Plaintiff Rasul was returned to his cell. Two weeks later, he was interrogated by a woman who may have been army personnel in civilian clothing. She informed him that he had passed the polygraph test. Plaintiff Rasul was transferred to a different cellblock and informed by interrogators that they had videos

which proved that he and Plaintiffs Iqbal and Ahmed were members of Al Qaeda and linked to the September 11 attacks.

104. A week later, Plaintiff Rasul was transferred to an isolation block, called "November." Plaintiff Rasul asked the army sergeant why he was being moved and was informed that the order was from the interrogators. Plaintiff Rasul was placed in a metal cell. To make the conditions of confinement continuously debilitating, the air conditioning was turned off during the day and turned on high at night. Temperatures were near 100 degrees during the day and 40 degrees at night. The extremes of heat and cold were deliberately utilized to intimidate, discomfort and break down prisoners. For one week, Plaintiff Rasul was held in isolation without interrogation. Later, he was taken to a room and "short shackled" and placed in an extremely cold room for six to seven hours. Short shackling consists of chaining the ankles and wrists closely together to force the detainee into a contorted and painful position. He was unable to move in the shackles and was not afforded an opportunity to go to the bathroom. He was hardly able to walk and suffered severe back pains. He was taken back to his cell without explanation.

105. The next day Plaintiff Rasul was "short shackled" and chained to the floor again for interrogation by an US Army intelligence officer named Bashir, also known as Danny. He was shown photographs of three men who were supposedly Plaintiffs Rasul, Iqbal and Ahmed with a man purported to be Mohammed Atta. Plaintiff Rasul

repeatedly and truthfully denied being the person in the photograph. Further, he repeatedly and truthfully denied any involvement with Al Qaeda or the September 11 attacks. On five or six more occasions, Plaintiff Rasul was interrogated in similar fashion. During these interrogations, Plaintiff Rasul was not provided with food and was not permitted to pray.

106. Following the first interrogation, on five or six occasions, Plaintiff Rasul was removed from his cell and brought back to the interrogation block for intervals of about four or five days at a time. He was repeatedly "short shackled," exposed to extremely loud rock or heavy metal music, and left alone in the interrogation room for up to 13 hours in the "long shackle" position.

107. During this period, a Marine captain and other soldiers arrived at Plaintiff Rasul's cell to transfer him to another block, where he would remain in isolation for another two months without "comfort items."

108. On one occasion, Plaintiff Rasul was brought to the interrogation room from isolation to be questioned by interrogators from the Criminal Investigations Division (CID). These interrogators, identified as "Drew" and "Terry," informed Plaintiff Rasul that they were going to begin military tribunals.

109. After continued interrogations as to his alleged presence in a photograph with Osama Bin Laden, Plaintiff Rasul explained that he was

working in England and going to college at the time the photograph was taken. Plaintiff Rasul told interrogators his place of employment at an English electronics shop and his attendance at University of Central England and implored interrogators to corroborate what he was telling them. The interrogators insisted he was lying. To Plaintiff's knowledge, no effort was made to find corroborating information which would have confirmed that Plaintiff Rasul was living in England at the time of the alleged meeting with Bin Laden in the photograph.

110. About a month after his second isolation period, Plaintiff Rasul was "long shackled" and placed in a room, where he was met by Bashir and a woman dressed in civilian clothing. Bashir informed Plaintiff Rasul that the woman had come from Washington to show him a video of an Osama Bin Laden rally in Afghanistan. After the woman showed Plaintiff Rasul a portion of the video, she asserted that it showed Plaintiffs Rasul, Iqbal and Ahmed sitting down with Bin Laden. The woman interrogator urged Plaintiff Rasul to admit that the allegation was true, but the persons in the video were not the Plaintiffs. Plaintiff Rasul continued truthfully to deny involvement. He was threatened that if he did not confess, he would be returned to isolation. Having been in isolation for five to six weeks, with the result that he was suffering from extreme mental anguish and disorientation, Plaintiff falsely confessed that he was in the video.

111. Plaintiff Rasul was then returned to isolation for another five to six weeks. During that

period he had no contact with any human being except with guards and interrogators who questioned him regarding the identity of certain individuals in photographs.

112. Plaintiff Rasul was then transferred to another cellblock, where both Plaintiffs Iqbal and Ahmed were being held. Here, Plaintiff Rasul was denied "comfort items" and exercise privileges.

113. Around mid-August of 2003, Plaintiff Rasul was moved within Camp Delta and placed in another cell block without explanation. After about two weeks, Plaintiff Rasul was taken to a building known as the "Brown Building" and was informed by an army intelligence interrogator named "James" that he would soon be moving to a cell next to Plaintiffs Iqbal and Ahmed.

114. Following the meeting with the army intelligence interrogator, Plaintiff Rasul was brought to "Kilo Block" the next day, where Plaintiffs Rasul, Iqbal and Ahmed were reunited and able to speak with one another.

115. For the next two weeks, Plaintiffs Rasul, Iqbal and Ahmed were brought in succession to be questioned by an army intelligence officer, known only as "James," as to their purported involvement in the 2000 video of Bin Laden.

116. On one occasion, Plaintiff Rasul was administered a voice stress analyzer test by "James."

117. After his last interrogation by "James," Plaintiff Rasul was informed that he would soon be turned over to Navy Intelligence. Before that, however, in September 2003, Plaintiff Rasul was further interrogated. He was brought into an interrogation room for eight hours. He was denied requests to pray and to have food or water. The following day, British officials questioned Plaintiff Rasul. Plaintiff Rasul informed an official, who gave the name "Martin," that he had been kept in isolation for three months without cause and had severe knee pain from the lack of exercise. Later that evening, Plaintiffs Rasul, Iqbal and Ahmed were taken to what was, on information and belief, a CIA interrogation block.

118. Plaintiffs continued to be held in the Kilo Block and were occasionally brought in for interrogation by a navy intelligence officer who gave the name "Romeo."

119. Plaintiff Iqbal was treated in a manner similar to the other Plaintiffs.

120. Plaintiff Iqbal was interrogated on several occasions, sometimes for as long as eight hours.

121. The typical routine was to be "short shackled" and placed in an extremely cold room.

122. Plaintiff Iqbal was relegated to Level 4, the harshest level, for about two weeks, with virtually no "comfort items." Soon after, he was

placed in isolation on the instruction of intelligence officers.

123. Plaintiff Iqbal's isolation cell was covered in human excrement. Plaintiff Iqbal had no soap or towels and could not clean the cell. He was unable to sit anywhere.

124. Plaintiff Iqbal was interrogated periodically to review photographs. On one occasion, he was placed in a "short shackled" position and left in a room with the air conditioning turned down to 40°. Plaintiff Iqbal was left in the "short shackle" position for about three hours. Then, Defendant John Doe, an interrogator calling himself "Mr. Smith," entered the room and teased Plaintiff Iqbal about the temperature. "Mr. Smith" told Plaintiff Iqbal that he was able to get anything Plaintiff Iqbal wanted. "Mr. Smith" then pulled out pornographic magazines and taunted him. Plaintiff Iqbal refused to talk to "Mr. Smith." "Mr. Smith" left Plaintiff Iqbal alone for another three or four hours in the frigid room. In that one day, Plaintiff Iqbal had been "short shackled" for seven to eight hours. Upon returning to his cell, he became ill with flu and requested medication. One of the military police officers, Defendant John Doe, denied him medication, and informed him that he was acting under orders from intelligence.

125. The next day, a Marine Captain and about 15 soldiers escorted Plaintiff Iqbal to another isolation block. He was left there for several days. Prior to his interrogation, Plaintiff Iqbal was "short shackled" and then introduced to an interrogator

who gave the name "James". Because the pain from the shackling became excruciating, Plaintiff Iqbal began to scream. After about three or four hours, "James" unshackled him.

126. After three days, Plaintiff Iqbal was taken to the "Brown Building," where he was "long shackled" and left in a room with strobe lighting and very loud music played repeatedly, making it impossible for him to think or sleep. After about an hour, Plaintiff Iqbal was taken back to his cell.

127. The next day, Plaintiff Iqbal was "short shackled" in the interrogation room for five or six hours before later being interrogated by "Drew," who identified himself as an agent from CID. Plaintiff Iqbal was shown photographs, but refused to look at them. He was "short shackled" for about four or five hours more. After a while, he was unable to bear the conditions and falsely confessed that he was pictured in the photographs.

128. Four days later, agents from the FBI interrogated Plaintiff Iqbal about his activities in 2000.

129. Plaintiff Iqbal remained in isolation and was questioned at one point by a military intelligence officer giving the name of "OJ." Soldiers threatened him with further beatings if he did not answer the questions.

130. Plaintiff Ahmed was interrogated on numerous occasions, particularly with respect to his knowledge of the Bin Laden video. He was

interrogated every three or four days, and the typical procedure was that he was first "short shackled" and placed in a freezing room with loud music for several hours.

131. Before arriving at Guantánamo, Plaintiff Ahmed was seriously sleep-deprived and malnourished. He was the first of the Plaintiffs to admit to various false accusations by interrogators.

132. Upon Plaintiff Ahmed's arrival at Camp Delta, he was placed in isolation for about one month. Following this period, he was placed in a different cell and interrogated by mostly American interrogators who asked him the same questions for six months.

133. Plaintiff Al-Harith also was given a lie detector test approximately one year into his detention which he was told he passed.

134. Plaintiff Al-Harith on three or four occasions witnessed Defendant John Does, military police, using an industrial strength hose to shoot strong jets of water at detainees. He was hosed down on one occasion. A guard walked along the gangway alternating the hose on each cell. Plaintiff Al-Harith was hosed down continuously for approximately one minute. The pressure of the water forced him to the back of his cell. The contents of his cell, including his bedding and Koran, were soaked.

135. Plaintiff Rasul, in the next cell, also had all the contents of his cell soaked.

136. In or around February 2004, Plaintiffs heard from military police that they would be released and sent home soon. Before leaving Camp Delta, Plaintiffs all were interrogated a final time. Plaintiffs were asked to sign statements admitting to membership in Al Qaeda and participation in terrorist activity. Plaintiffs declined.

137. In March 2004, Plaintiffs were released from Camp Delta and flown to the United Kingdom.

Injuries

138. Plaintiffs suffered and continue to suffer from the cruel, inhuman, and degrading treatment they experienced during their detention. The "short shackling" which Plaintiffs were exposed to resulted in deep cuts at their ankles, permanent scarring, and chronic pain. Plaintiff Rasul has chronic pain in his knees and back. Plaintiff Ahmed also suffers from permanent deterioration of his eyesight because of the withholding of required special lenses as "comfort items."

139. Plaintiff Al-Harith suffers from severe and chronic pain in his knees from repeatedly being forced onto his knees and pressed downwards by guards whenever he left his cell. He also has experienced pain in his right elbow.

140. Plaintiffs further suffer from acute psychological symptoms.

Development and Implementation of a Plan of Torture and Other Physical and Psychological Mistreatment of Detainees

141. The torture, threats, physical and psychological abuse inflicted upon Plaintiffs were devised, approved, and implemented by Defendant Rumsfeld and other Defendants in the military chain of command. These techniques were intended as interrogation techniques to be used on detainees.

142. It is well-established that the use of force in interrogation is prohibited by domestic and international law. The United States Army strictly prohibits the use of such techniques and advises its interrogators that their use may lead to criminal prosecution. Army Field Manual 34-52, Ch. 1, "Intelligence Interrogation," provides:

> **Prohibition Against Use of Force**
>
> The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind ***is prohibited by law*** and is neither authorized nor condoned by the US Government.... The psychological techniques and principles outlined should neither be confused with, nor construed to be synonymous with, unauthorized techniques such as brainwashing, mental torture, or any other form of mental coercion to include drugs. These techniques and principles are intended to serve as guides in

> obtaining the willing cooperation of a source. The absence of threats in interrogation is intentional, as their enforcement and use normally **constitute *violations of international law and may result in prosecution.*** (Emphasis supplied).

143. Further, according to Field Manual 34-52, ch. 1: "Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear."

144. Army Field Manual 27-10, "The Law of Land Warfare," summarizes the domestic and international legal rules applicable to the conduct of war. Field Manual 27-10 recognizes the following sources of the law of war:

The law of war is derived from two principal sources:

a. *Lawmaking Treaties (or Conventions)*, such as the Hague and Geneva Conventions.

b. *Custom*. Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly

> established by the custom of nations and well defined by recognized authorities on international law.

Id. at Ch. 1, § I.

145. In spite of the prohibitions on the use of force, threats, and abuse in the Army Field Manual, and its clear acknowledgement that their use violates international and domestic law, Defendant Rumsfeld approved techniques that were in violation of those prohibitions and thus knowingly violated the rights of Plaintiffs.

146. In a press release dated June 22, 2004, Defendant Rumsfeld admitted that beginning December 2, 2002, he personally authorized the use of interrogation techniques that are not permitted under FM 34-52. Further, in the press release, Defendant Rumsfeld admits that he personally was consulted when certain of the techniques were to be utilized.

147. The techniques practiced on Plaintiffs – including beatings, "short shackling," sleep deprivation, injections of unknown substances, subjection to cold or heat, hooding, stress positions, isolation, forced shaving, disruption of religious practices, forced nakedness, intimidation with vicious dogs and threats – were known to and approved by Defendant Rumsfeld and others in the military chain of command.

148. Article 3 common to all four Geneva Conventions requires that all persons in the hands of

an opposing force, regardless of their legal status, be afforded certain minimum standards of treatment: Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> * * * * *
>
> (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment.

149. The Third Geneva Convention of 1949, Art. 130, bars the "willful killing, torture or inhuman treatment . . . willfully causing great suffering or serious injury to body or health" of any prisoner of war.

150. In February 2002, the White House issued a press release, which advised:

> The United States is treating and will continue to treat all of the individuals detained at Guantánamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.
>
> The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-Qaeda detainees. Al-Qaeda is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.

151. On information and belief, Defendant Rumsfeld and all Defendants were aware of this statement of the President. Moreover, Defendant Rumsfeld knew that this statement of policy was a departure from the previous policy of the United States that the laws of war, including the Geneva Conventions, were always to be honored. Defendant Rumsfeld knew that the Department of State and the uniformed services took the generally recognized position that the Geneva Conventions could not be abrogated or ignored.

152. However, Defendant Rumsfeld and others deliberated failed to implement the Presidential Directive in any event. Defendant Rumsfeld and other Defendants in the chain of command had no good faith basis for believing that

Plaintiffs were members of or affiliated with Al Qaeda in any way. Indeed, the policy as announced was incoherent in that Defendant Rumsfeld and the other defendants had no way of knowing who was and who was not a member of Al Qaeda or the Taliban and Defendants took no steps to implement any reliable fact-finding process which might ascertain who was and who was not a member of Al Qaeda or the Taliban, including in particular a "competent tribunal" as mandated by the Third Geneva Convention, Art. 5, U.S. military regulations and long standing practice of the U.S. armed forces.

153. Defendant Rumsfeld and all Defendants were aware that torture and other mistreatment perpetrated under color of law violates domestic and international law at.

154. Defendant Rumsfeld and all Defendants were aware that Plaintiffs were tortured and otherwise mistreated or knew they would be tortured and otherwise mistreated while in military custody in Afghanistan and at Guantánamo.

155. Defendant Rumsfeld and all Defendants took no steps to prevent the infliction of torture and other mistreatment to which Plaintiffs were subjected.

156. Defendant Rumsfeld and all Defendants authorized and encouraged the infliction of torture and other mistreatment against Plaintiffs.

157. Defendant Rumsfeld and all Defendants were aware that prolonged arbitrary detention violates customary international law.

158. Defendant Rumsfeld and all Defendants authorized and condoned the prolonged arbitrary detention of Plaintiffs.

Count I
ALIEN TORT STATUTE
Prolonged Arbitrary Detention

159. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

160. As stated by the Supreme Court of the United States, the allegations contained herein "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Rasul v. Bush*, 124 S. Ct. 2686, 2698, n.15 (2004) (citation omitted) (Plaintiffs Rhuhel Ahmed and Asif Iqbal were also Plaintiffs in that case).

161. Plaintiffs Rasul, Iqbal and Ahmed were unarmed and were detained in a prison camp operated by non-U.S. forces and Plaintiff Al-Harith had been detained and mistreated by the Taliban as a suspected British spy and was trapped in a war zone when Defendants took physical custody of their persons. Plaintiffs never engaged in combat, carried arms, or participated in terrorist activity or conspired with any terrorist person or organization. Defendants could have had no good-faith reason to believe that they had done so.

162. The Plaintiffs were detained under the exclusive custody and control of Defendants for *over two years* without due process, access to counsel or family, or a single charge of wrongdoing being levied against them.

163. The acts described herein constitute prolonged arbitrary detention in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. §1350, in that the acts violated customary international law prohibiting prolonged arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

164. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention of Plaintiffs.

165. Defendant's unlawful conduct deprived Plaintiffs of their freedom, of contact with their families, friends and communities. As a result, Plaintiffs suffered severe psychological abuse and injuries.

166. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count II
ALIEN TORT STATUTE
Torture

167. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

168. The acts described herein were inflicted deliberately and intentionally for purposes which included, among others, punishing the Plaintiffs or intimidating them. The alleged acts did not serve any legitimate intelligence-gathering or other government purpose. Instead, they were perpetrated to coerce, punish, and intimidate the Plaintiffs. In any event, torture is not permitted as a legitimate government function under any circumstances.

169. The acts described herein constitute torture in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting torture as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

170. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered acquiesced, confirmed, ratified and or/conspired together in bringing about the torture and other physical and psychological abuse of Plaintiffs as described above.

171. Plaintiffs suffered severe, immediate and continuing physical and psychological abuse as a result of the acts alleged herein. Plaintiffs continue to suffer profound physical and psychological trauma from the acts alleged herein.

172. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count III
ALIEN TORT STATUTE
Cruel, Inhuman or Degrading Treatment

173. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

174. The acts described herein had the intent and the effect of grossly humiliating and debasing the Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance.

175. These acts included inter alia repeated severe beatings; the withholding of food, water, and necessary medical care; sleep deprivation; lack of basic hygiene; intentional exposure to extremes of heat and cold and the elements; continuous isolation for a period of months; forced injections; sexual humiliation; intimidation with unmuzzled dogs; deprivation of the rights to practice their religion and death threats.

176. The acts described herein constitute cruel, inhuman or degrading treatment in violation

of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting cruel, inhuman or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

177. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the cruel, inhuman or degrading treatment of Plaintiffs as described above.

178. Plaintiffs suffered severe immediate physical and psychological abuse as a result of the acts alleged herein. Plaintiffs continue to suffer profound physical and psychological trauma from the acts alleged herein.

179. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count IV
VIOLATION OF THE GENEVA CONVENTIONS

180. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

181. As detailed herein, Plaintiffs were held arbitrarily, tortured and otherwise mistreated during their detention in violation of specific

protections of the Third and Fourth Geneva Conventions including but not limited to Article 3 common to all four Geneva Conventions.

182. Violations of the Geneva Conventions are direct treaty violations as well as violations of customary international law.

183. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention, torture, abuse and mistreatment of Plaintiffs as described above.

184. As a result of Defendants' violations of the Geneva Conventions, Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count V
CLAIMS UNDER THE CONSTITUTION OF THE UNITED STATES
Violation of the Eighth Amendment

185. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 thorugh 158 of this Complaint as if fully set forth herein.

186. Defendants' actions alleged herein against imprisoned Plaintiffs violated the Eighth Amendment to the United States Constitution. Over the course of an arbitrary and baseless incarceration for more than two years, Defendants inflicted cruel

and unusual punishment on Plaintiffs. Despite never having been tried by any tribunal, Plaintiffs and other detainees were repeatedly denounced as guilty of terrorist acts by Defendant Rumsfeld, President Bush, Vice President Cheney and others. The acts of cruel, inhuman or degrading unusual punishment were imposed based on this arbitrary and impermissible declaration of guilt.

187. Defendants were acting under color of law of the United States at all times pertinent to the allegations set forth above.

188. The Plaintiffs suffered severe physical and mental injuries as a result of Defendants' violations of the Eighth Amendment. They have also suffered present and future economic damage.

189. The actions of Defendants are actionable under *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971).

190. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention, physical and psychological torture and abuse, and other mistreatment of Plaintiffs as described above.

191. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count VI
CLAIMS UNDER THE CONSTITUTION OF THE UNITED STATES
Violation of the Fifth Amendment

192. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

193. Defendants' actions alleged herein against Plaintiffs violated the Fifth Amendment to the United States Constitution.

194. The arbitrary and baseless detention of Plaintiffs for more than two years constituted a clear deprivation of their liberty without due process, in direct violation of their Fifth Amendment rights.

195. The cruel, inhuman or degrading, and unusual conditions of Plaintiffs' incarceration clearly violated their substantive rights to due process. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983).

196. Defendants' refusal to permit Plaintiffs to consult with counsel or to have access to neutral tribunals to challenge the fact and conditions of their confinement constituted violations of Plaintiffs' procedural rights to due process.

197. The abusive conditions of Plaintiffs' incarceration served no legitimate government purpose.

198. Defendants were acting under the color of the law of the United States at all times pertinent to the allegations set forth above.

199. The Plaintiffs suffered severe physical and mental injuries as a result of Defendants' violations of the Fifth Amendment. They have also suffered present and future economic damage.

200. The actions of Defendants are actionable under *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388 (1971).

201. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about the prolonged arbitrary detention, physical and psychological torture and abuse and other mistreatment of Plaintiffs as described above.

202. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

Count VII
CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

203. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 158 of this Complaint as if fully set forth herein.

204. Defendants' actions alleged herein inhibited and constrained religiously motivated conduct central to Plaintiffs' religious beliefs.

205. Defendants' actions imposed a substantial burden on Plaintiffs' abilities to exercise and express their religious beliefs.

206. Defendants regularly and systematically engaged in practices specifically aimed at disrupting Plaintiffs' religious practices. These acts included throwing a copy of the Koran in a toilet bucket, prohibiting prayer, deliberately interrupting prayers, playing loud rock music to interrupt prayers, withholding the Koran without reason or as punishment, forcing prisoners to pray with exposed genital areas, withholding prayer mats and confining Plaintiffs under conditions where it was impossible or infeasible for them to exercise their religious rights.

207. Defendants were acting under the color of the law of the United States at all times pertinent to the allegations set forth above.

208. The Plaintiffs suffered damages as a direct and proximate result of Defendants' violations of the Religious Freedom Restoration Act, 42 U.S.C.A §§ 2000bb et seq.

209. Defendants are liable for said conduct in that Defendants participated in, set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, aided and abetted and/or conspired together in bringing about

the denial, disruption and interference with Plaintiffs' religious practices and beliefs as described above.

210. Plaintiffs are entitled to monetary damages and other relief to be determined at trial.

WHEREFORE Plaintiffs each demand judgment against Defendants jointly and severally, including compensatory damages in the amount of $10,000,000 each (Ten Million Dollars), punitive damages, the costs of this action, including reasonable attorneys' fees, and such other and further relief as this Court may deem just and proper.

Dated: October 27, 2004

/s/

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APPENDIX K

UNITED NATIONS **CAT**

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.
GENERAL

CAT/C/28/Add.5
9 Februray 2000

Orginial: ENGLISH

COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Initial reports of States parties due in 1995

Addendum

UNITED STATES OF AMERICA*

[15 October 1999]

* The list of Annexes.

GE.00 – 40656(E)

97. A further understanding was intended to make clear that the term "sanctions" in article 1 includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. However, as this understanding explicitly noted, a State party could not through the imposition of domestically lawful "official sanctions" defeat the object and purpose of the Convention to prohibit torture.

98. The United States further stated its view that the term "acquiescence", as used in article 1, requires that a "public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity". The purpose of this condition was to make it clear that both actual knowledge and "wilful blindness" fall within the definition of "acquiescence" in article 1.

99. Finally, in order to guard against the improper application of the Convention to legitimate law enforcement actions, the United States stated its understanding that non-compliance with applicable legal procedural standards (such as the *Miranda* warnings referred to above) does not per se constitute "torture".

B. Prohibition of Torture

100. Every act of torture within the meaning of the Convention is illegal under existing federal and state

law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes. Such prosecutions do in fact occur in appropriate circumstances. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.

101. United States law recognizes and protects the fundamental right of everyone to life, liberty and inviolability of his or her person. Every system of criminal law in the United States clearly and categorically prohibits acts of violence against the person, whether physical or mental, which would constitute an act of torture within the meaning of the Convention. Such acts may be prosecuted, for example, as assault, battery or mayhem in cases of physical injury; as homicide, murder or manslaughter when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt or a conspiracy, an act of racketeering, or a criminal violation of an individual's civil rights. While the specific legal nomenclature and definitions vary from jurisdiction to jurisdiction, it is clear that any act of torture falling within the Convention would in fact be criminally prosecutable in every jurisdiction within the United States.

102. In some jurisdictions, state law currently recognizes a specific crime of "murder by torture" as a statutorily enumerated type of first-degree murder ("intentional homicide") involving wilful, deliberate and premeditated infliction of pain and suffering and

subject to especially severe penalties ("malice aforethought"). See, e.g., Idaho I.C. §§ 18-4001 and 18-4003; Nevada N.R.S. § 200.033; New York Penal § 125.27; South Carolina Code 1976 § 16-3-20; Tennessee T.C.A. § 39-13-204. In few state or local jurisdictions, however, is "torture" itself a separate crime. But see California Penal Code Title 8 § 206 (prohibiting torture); Conn. G.S.A. § 53-20 (cruelty to persons); Alabama Stats. § 13A-6-65.1 ("sexual torture" as a Class A felony).

107. Because the Eighth Amendment incorporates contemporary standards of decency, its interpretation continues to evolve. In *Helling v. McKinney*, 509 U.S. 25 (1992), for example, the U.S. Supreme Court held that the health risks posed by involuntary exposure of prison inmates to environmental tobacco smoke can form the basis of a claim under the Eighth Amendment. As stated earlier in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200 (1989),

> "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being ... The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable shelter - it transgresses the substantive limits on state action set by the Eighth Amendment ..."

108. As a technical legal matter, the protections of the Eighth Amendment apply only to "punishments", that is, to the treatment of individuals who have

been convicted of a crime and are therefore in the custody of the Government. *Ingraham v. Wright*, 430 U.S. 651 (1977); *United States v. Lovett*, 328 U.S. 303 (1946).

109. Military justice system. The Eighth Amendment applies with equal force to the military justice system. Moreover, article 55 of the Uniform Code of Military Justice ("UCMJ") specifically prohibits punishment by flogging, branding, marking or tattooing on the body, or any other cruel or unusual punishment. The article also prohibits the use of restraints known as "irons" whether single or double, except for the purpose of safe custody. Indeed, a commanding officer who orders such punishment would be acting outside the scope of his or her position and would be individually liable for the intentional infliction of bodily and emotional harm. In addition, article 93 of the UCMJ makes it a criminal offence for a military member to engage in acts constituting cruelty and maltreatment (including sexual harassment) toward a subordinate.

110. Under the UCMJ, an individual may be apprehended ("arrested") only upon reasonable belief that an offence has been committed and that the person apprehended has committed it. Permissible grounds for, and conditions of, pre-trial confinement are also spelled out in the UCMJ, including the right of the person confined to be notified of the nature of the offence charged, to remain silent, to retain civilian counsel at no expense to the Government, to military counsel at no cost, and to be familiar with the procedures for review of pre-trial confinement. Pre-trial confinement must be affirmed by the

commander within 72 hours, and a pre-trial confinement hearing is required to be conducted by a neutral and detached magistrate who may order the release of the person being confined. Once charges against the detainee are referred to trial by court martial, the appropriateness of pre-trial confinement may again be reviewed by the military judge.

111. The Department of Defense has adopted the "Common Rule" for human subjects of medical research referred to below. See 32 C.F.R. Part 219.

112. Other constitutional provisions. Because the Eighth Amendment by its terms applies to "punishments", courts have looked to other constitutional provisions, in particular the Fourth

APPENDIX L

U.S. DEPARTMENT OF STATE

Second Periodic Report of the United States of America to the Committee Against Torture

Submitted by the United States of America to the Committee Against Torture, May 6, 2005

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I. Introduction

1. The Government of the United States of America welcomes the opportunity to report to the Committee Against Torture on measures giving effect to its undertakings under the Convention Against Torture and Other. Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), pursuant to Article 19 thereof and on other Information that may be helpful to the Committee. The organization of this Second Periodic report follows the General guidelines regarding the form and contents of periodic reports to be submitted by states parties (CAT/C/14/Rev.1).

2. This report was prepared by the U.S. Department of State ("Department of State") with extensive assistance from the U.S. Department of Justice ("Department of Justice"), the U.S. Department of Homeland Security ("Department of Homeland Security"}, the U.S. Department of Defense

("Department of Defense") and other relevant departments and agencies of the United States: Government Except where otherwise noted, the report covers the situation for the period after October 1999 and prior to March 1, 2005.

The United States submitted its Initial Report to the Committee Against Torture in October 1999 (CAT/C/28/Add.5), hereafter referred to as "Initial Report". It made its oral presentation of that report to the Committee on May 10-15, 2000. Accordingly, the purpose of this Second Periodic Report is to provide an update of relevant information arising since the submission of the Initial Report.

Since the Initial Report, with the attacks against the United States of September 11, 2001, global terrorism has fundamentally altered our world. In fighting terrorism, the U.S. remains committed to respecting the rule of law, Including the U.S. Constitution, federal statutes, and International treaty obligations, including the Torture Convention.

The President of the United States has made clear that the United States stands against and will not tolerate torture under any circumstances. On the United Nations International Day in Support of Victims of Torture, June 26, 2004, the President confirmed the continued importance of these protections and of U.S. obligations under the Torture Convention, stating:

...[T]he United States reaffirms its commitment to the worldwide elimination of torture .... To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction....

These times of increasing terror challenge the world. Terror organizations challenge our comfort and our principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere. See Annex 2.

3. The United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. Government.

4. All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world.

APPENDIX M

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 06-5222

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHAFIQ RASUL, *et al.*,

Plaintiffs-Appellants,

v.

DONALD RUMSFELD, *et al.*,

Defendants-Appellees.

On Appeal From The United States District Court
For The District Of Columbia,
C.A. No. 1:04cv01864 (RMU),
The Honorable Ricardo M. Urbina

BRIEF OF *AMICI CURIAE*
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March 20, 2007

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28.1 *amici* certify the following:

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

Except for the following, all parties, intervenors and *amici* appearing before the District Court and this Court are listed in the Brief for Appellants Shafiq Rasul, *et al.*

1. *Amici* Counsel for Guantánamo Detainees, Reprieve, Cageprisoners, and James Yee are identified in an addendum to this brief.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Appellants Shafiq Rasul, *et al.*

C. RELATED CASES

References to the related cases appear in Brief for Appellants Shafiq Rasul, *et al.*

CERTIFICATE PURSUANT TO RULE 29(d)

Pursuant to Circuit Rule 29(d), counsel for *Amici Curiae* Counsel for Guantánamo Detainees, Reprieve, Cageprisoners, and James Yee certify that as of the date of this certification, the only other brief *amicus curiae* of which we are aware is the Brief of The Baptist Joint Committee for Religious Liberty, The National Association of Evangelicals, The National Council of Churches, The American Jewish Committee, The stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), The General Conference of Seventh-day Adventists, And The United States Conference of Catholic Bishops as *Amicus Curiae* In Support of Cross-Appellees In Regard to the Cross-Appeal. These two briefs could not be joined as a single memorandum because the perspectives and analyses provided in each brief are completely distinct. In the instant brief, *amici* provide unique, detailed accounts of religious abuse to demonstrate the gravity and widespread nature of the religious abuses in Guantánamo and the negative impact any decision regarding qualified immunity will have on current detainees. In the Brief of Baptist Joint Committee for Religious Liberty et al, a consortium of religious entities argues that the plain text and legislative history of the Religious Freedom Restoration Act clearly evidences its application to Guantánamo and its coverage of non-US citizens. Any overlap between the briefs is insignificant and,

given the markedly different approach and experience from the *amici* in the Brief of Baptist Joint Committee for Religious Liberty, it was impractical to consolidate these two briefs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for *Amici Curiae* Counsel for Guantánamo Detainees, Reprieve, Cageprisoners, and James Yee makes the following disclosure:

None of the *amici* is a publicly held entity. None of the *amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the *amici*.

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LIST OF AMICI COUNSEL

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INTEREST OF THE *AMICI*

This Brief of *Amici Curiae* Counsel for Guantánamo Detainees, Reprieve, and Cageprisoners and James Vee is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29 in support of the Appellants.[1]

Amici are the counsel of current or former detainees held in US custody in Guantánamo Bay, organizations dedicated to the promotion of human rights and religious protections of prisoners worldwide, and James Vee the Muslim chaplain formerly serving at Guantánamo. *Amici* have observed and/or reported incidents of abuses of religious rights in Guantánamo and the failure of the US-run detention facility to provide adequate protections for its prisoners. They are deeply concerned at the widespread, first-hand and long-standing reports of substantial burdens on religious rights in Guantánamo and the growing concern that meaningful legal procedures for verifying and preventing such mistreatment will be foreclosed. *Amici* are particularly concerned that the recent decision in *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20 2007) will strip future plaintiffs of claims under the Religious Freedom Restoration Act ("RFRA"). This case therefore may determine whether current and former detainees and their counsel ever have the opportunity to put their experiences before the

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[1] All parties have consented to the filing of this Brief of *Amici Curiae*.

Court, to protect their religious rights in Guantánamo and to seek redress for the injuries they have suffered from of violations of the explicit mandate of RFRA. *Amici* therefore have a strong interest in ensuring the existence of legal means through which prisoners in Guantánamo can practice their religion and challenge the ongoing abuses of their clearly established rights under RFRA.

Reprieve is a group of international charities dedicated to assisting in the provision of effective legal representation and protection of basic human rights to prisoners mandated by RFRA. It is currently representing at least 40 detainees in Guantánamo and regularly reports on the widespread human rights abuses in the US-run camps.

Cageprisoners is a non-governmental human rights organization that exists solely to raise awareness of the plight of the prisoners at Guantánamo Bay and other detainees held as part of the War on Terror. It has issued detailed reports on religious abuse in Guantánamo, including a report on the desecration of the Koran that included over 50 incidents.

James Yee is the former Muslim chaplain at Guantánamo Bay who served there in 2002 and 2003 in the rank of captain. Chaplain Yee met daily with the prisoners, observing prison operations, and ministering to the detainees. He was responsible for drafting the regulations for proper handling of the Koran by US military personnel after numerous

complaints had been voiced on this issue. His perspective on the friction between prison regulations and the practice and observance of Islam at the base is unique.

Amici also include many counsel of Current and former Guantánamo detainees, listed in an addendum to this brief.

While *amici curiae* pursue and protect a wide range of legal interests, they all share a commitment to the rule of law and the preservation of the religious rights of prisoners mandated by RFRA. Thus, the participation of *amici* will assist this Court in understanding the profound implications and practical consequences of US officials' practices regarding the prisoners' exercise of their religious rights in Guantánamo Bay prison.

SUMMARY OF ARGUMENT

The court below concluded that RFRA applied to the US military base in Guantánamo Bay and held that defendants were not entitled to qualified immunity for violations of this act, because the plaintiffs' rights thereunder were well-established at the time of the alleged violations.[2] The Court further held that, "given the abhorrent nature of the allegations and given our Nation's fundamental commitment to religious liberty ... a reasonable official would understand that what he is doing violates that right [under RFRA].[3]

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[2] *Rasul v. Rumsfeld*, 433 F. Supp.2d 58, 71 (D.D.C. 2006).

[3] *Id.* at 71 (internal citations omitted).

Amici urge that the District Court's ruling be affirmed. RFRA reflects a profound injunction against government intrusion on legitimate exercise of religious practices and observances. We express our alarm at the reliable, well-documented findings of violations of prisoners' religious rights in Guantánamo. *Amici* further are concerned that the government is systematically targeting and denigrating core tenets and rites of Islam under the guise of "penal regulations" ostensibly neutral on their face. The cited reports indicate that Muslim prisoners in US custody at the American prison in Guantánamo Bay have been and continue to be deprived of their religious rights, notwithstanding the clear protections of RFRA. We draw the Court's attention to facts in the public record[4] to show the dire impact a reversal of the decision below would have on the Guantánamo prisoners' religious rights. Such facts are within the ambit of specific allegations of the Complaint *(see* ¶ 206) and may be

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[4] In a separate Addendum proffered herewith, *amici* provide the Court with this extra-record material to aid in deciding the legal issues, and to underscore the gravity of the decision before the Court. *See* Brief for Amicus Curiae Human Rights, Legal, and other Public Interest Organizations, *INS v. Aguirre-Aguirre,* No. 97-1754, 1999, WESTLAW 26718 (9th Cir. Jan. 21, 1999) (amicus brief concerning background conditions in Guatemala); *Regents v. Bakke,* 438 U.S. 265, 316-17, 321-24 (1978) (extra-record material concerning admissions policies of *amici curiae); New Jersey v. T.L.O,* 469 U.S. 325, 339 (1985) (social science material about the effects of drugs and violence in schools); *Ravindran v. INS,* 976 F.2d 754, 756 (1st Cir. 1992) (background history of ethnic conflict in Sri Lanka); *Bajwa v. Cobb,* 727 F. Supp. 53 at n.2 (D. Mass. 1989) (extra-record sources regarding Sikhs in India). To the extent these sources are electronically available, *amici* have provided citations accordingly.

shown in support thereof. Not only have US military guards and interrogators intentionally targeted the religious practices of the prisoners, but they have done so under the umbrella of a US policy that effectively condones such behavior with a "wink and a nod."

Were this Court to reverse and accord qualified immunity to defendants here, current and former prisoners would be denied any legal recourse. The ruling in *Boumediene v. Bush,* No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007) effectively ensures (unless reversed) that this case will be the prisoners' sole avenue to demonstrate the urgent need for the protection of their religious practices. A refusal to rein in conduct in violation of prisoners' religious rights, by reversing the District Court's decision denying qualified immunity, would give a green light for the continuation of such abuses.

ARGUMENT

I. THE CORE TENETS OF ISLAM REQUIRE DAILY PRAYER; IMPOSE RITUALS OF DRESS AND BEHAVIOR; AND OBLIGE SPECIAL TREATMENT OF THE KORAN

RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion, even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). RFRA, therefore, unambiguously protects Muslim prisoners, as it does prisoners of other faiths, in their

religious practices. *See, e.g., Jackson v. District of Columbia,* 254 F.3d 262, 265 (D.C. Cir. 2001) (RFRA could apply to protect Muslim prisoners from a grooming policy requiring prisoners to shave); *Mack* v. *O'Leary,* 80 F.3d 1175 (7th Cir. 1996), *vacated on other grounds,* 522 U.S. 801 (1997), *on remand* 151 F.3d 1033 (7th Cir. 1998) (Table) (right to observe Ramadan protected hy RFRA). Despite this well-established protection of Muslim practices, US personnel at Guantánamo have consistently targeted the core tenets of Islam in their treatment of the prisoners.

While these core tenets are generally widely known, by way of background, *amici* stress the following essential principles and practices of Islam in order to frame how the abuse in Guantánamo strikes at the core of the prisoners' right to religious practice and their religious identity. As James Yee, a military chaplain stationed in Guantánamo in 2002 and 2003, wrote, "Islam is not just a religion; it is a way of life. This was something that many Joint Task Force personnel came to understand. And because religion was the most important issue for nearly all the prisoners in Camp Delta, it became the most important weapon used against them." James Yee, *For God and Country: Faith and Patriotism Under Fire,* 110 (2005).

A. Daily Prayer

Muslims are required by the Koran to pray five times daily, at specified times. Mohamed Nimer, *Correctional Institution's Guide to Islamic Religious Practices,* Council on American-Islamic Relations 2

(2005) *available at www.cairnet. org/downloads/correctionalguide.pdf* (last visited Feb. 27, 2007). Prayer on Jum'ah (Friday) is "an essential part of Islamic religious life," and "is an obligation on each individual Muslim." Brief for Imam Jamh Abdullah Al-Amin, *et al.* as *Amici Curiae* Supporting Respondents, *O'Lone v. Shabazz,* 482 U.S. 342 (1987), 1987 WESTLAW 880917, at *18. On Jum'ah, it is "essential for the Muslims to observe obligatory prayers in congregation." *Id.* at *31; *see also* Nimer, *supra* at 3 (discussing requirements for Friday congregational prayer).

Muslim prayer involves recitation from the Koran and requires that the person be able to stand, bow, and touch his or her forehead to the ground. Nimer, *supra* at 3. The restraints and living conditions for prisoners "should allow enough space for inmates to fulfill the prayer requirement." *Id.* at 3. Before prayer, Muslims are required to wash their hands, faces, and feet with pure water (a practice called *wudu). Id.* at 4.

B. The Koran

Muslims believe that the Koran contains the words of God as directly recorded by the prophet Mohammad and, therefore, it must be treated with the utmost respect. Muslims generally keep the Koran in a high place inside the home and do not allow it to touch the floor or anything dirty. They also believe that "a condition for handling the Qur'an is cleanliness and ritual purity," and the stricter interpretations of the law consider "a non-Muslim

handling the Qur'an as sacrilegious." Yee, *supra* at 111.[5]

C. Awrah: The Requirement of Modesty During Prayer

Islam prohibits Muslims from uncovering private parts in public. For Muslim men, the *awrah*, or private region, is from the knees to the bellybutton. Nimer, *supra* at 4. It is particularly important for Muslims to cover themselves during prayer, and whenever they are in public. *Id.* at 4.

D. Beards

Wearing a beard is one of the most important cultural and religious signifiers of being a Muslim, and many Muslim scholars are of the opinion that "the wearing of a beard is a religious obligation." *Id.* at 4.[6] The District of Columbia has already recognized the religious nature of wearing a beard for Muslims, holding that a forced grooming policy would impose a substantial burden under RFRA. *Jackson*, 89 F. Supp. 2d at 53-54.

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[5] *See also,* Surah Al-Waq-ia, 56:77-80 *available at http://www.irf.net/irf/dtp/dawahtech/ques9.htm.* ("That this is indeed a Qur'an most honorable in a book well guarded which none shall touch but those who are clean.")

[6] *See also,* Sahih Al-Bukhari, Volume 7, Book 72, Hadith # 780 *available at http://www usc. edu/dept/MSA/fundamentals/hadithsunnah/bukhari/ 072. sbt.html* (last visited Feb. 26, 2007) ("The Prophet said, 'Keep the beards and cut the moustaches short'").

E. Presence and/or Touching by Women

"Islam forbids any mixing between the sexes that might provide even the remotest possibility of temptation." Shaikh Sami al-Majid, *Free-Mixing Between Men and Women,* Islam Today, *available at http://www.islamtoday.net/English/showme2.cfm?cat_id=2&sub_cat_id=-594* (last visited Feb. 26, 2007). Some teachings find unlawful "any occasion where unrelated women and men are seated next to one another" *Id.* The purpose of these laws is to prevent the "danger of their making physical contact," which is expressly prohibited between unmarried, unrelated men and women. *Id.*

F. Ramadan

Ramadan is an annual month-long period during which Muslims refrain from eating and drinking from dawn to sunset. Nimer, *supra* at 5. This requires a temporary change in food schedule for Muslim inmates. *Id.*

As set forth below, these core tenets of Islamic religious rights under RFRA have been and are being consistently abused.

II. THE COMPLAINT ALLEGES, AND INDEPENDENT EVIDENCE CONFIRMS, CLEAR VIOLATIONS OF RFRA AT GUANTÁNAMO

Widespread reports by US agencies, former and current prisoners, and human rights

organizations verify cruel, inhuman, and often violent abuse of prisoners' religious rights at Guantánamo. *See, e.g.*, Army Regulation 15-6 Final Report, *Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility,* 11 (April 1, 2005) (hereinafter "Schmidt Report") (Add. Exh. 1); Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay Cuba* 25 (2006) (hereinafter "CCR Torture Report"); Second Periodic Report of the United Nations under the Convention Against Torture, UN Doc. CAT/C/USA/2, 25 July 2006, ¶ 24 (calling for the US to rescind any torture technique involving sexual humiliation). As the District Court correctly pointed out in the decision below, acts like, "[f]lushing the Koran down the toilet and forcing Muslims to shave their beards fall[] comfortably within the conduct prohibited from government action by RFRA." *Rasul v. Rumsfeld,* 433 F. Supp. 2d 58, 69 (D.D.C. 2006). This wellreasoned holding accords with the rulings in other federal cases applying RFRA to similar auuses of religious rights. *Jackson,* 254 F.3d at 265 (RFRA could apply to protect Muslim prisoners from a grooming policy requiring prisoners to shave); *Mack,* 80 F.3d at 1175 (right to observe Ramadan protected by RFRA); *Taylor v. Cox,* 912 F. Supp. 140, 144-45 (E.D. Pa. 1995) (confiscation of Koran could be covered by RFRA).

The acts alleged in the present complaint not only fall easily within the behavior prohibited by RFRA, but also form part of a long and well-documented history of abuse in Guantánamo. The

camps at Guantánamo are a place where the religious practices of the prisoners are substantially burdened in deliberate, degrading and often violent ways

A. Interruption/Prevention of Prayer

As noted, daily prayer is an essential and widely-known tenet of Islam. The guards at Guantánamo have deliberately prevented the prisoners' daily prayers in a number of ways. For example, James Vee, a military chaplain stationed in Guantánamo during 2003, describes the guards' behavior as follows:

> The call to prayer could be heard throughout the camp and many days, as the recitations of the Qur'an began, I knew that on some blocks, the guards were preparing to strike. They would do everything they could to disrupt the prisoners in prayer. In every block, the prayer was led by the detainee in the northeastern must cage, considered the closest to Mecca. As they led the prayer, the MPs would gather around their cage and mock them. They would rattle the cage doors and gather stones from the gravel roads surrounding the blocks and throw them against the cages as the prisoners prayed. They'd stomp their feet and yell across the blocks to one another. They would also mock the call to prayer and play loud rock and roll music over the PA system.

Yee, *supra* at 110. A current prisoner, Sami al Haj, stated in January 2007 that this practice continues: "The guards do not respect prayer time. They talk loudly, and make noises as the prisoners try to pray." Mem. of Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007 (Add. Exh. 2).

Reports of this deliberate, unjustifiable interruption of the prisoners' prayers were confirmed in several reports, including a 2005 investigation by Lieutenant General Randall M. Schmidt. *See* Schmidt Report, *supra*. In one instance, an FBI Special Agent reported that, "in an effort to disrupt detainees who were praying during interrogations, female military intelligence personnel would wet their hands then touch the detainee's face, causing the detainee to stop praying because he considered himself unclean." FBI Investigation Report, Sept. 7, 2004, pg. 2, *available at http://foia.fbi.gov/fllelink.html?file=/Guantánamo/detainees.pdf* (last visited March 10, 2007) (Add. Exh. 3). Similarly, in October 2002, an FBI Special Agent observed a detainee who "had been gagged with duct tape that covered much of his head." FBI Investigation Report, July 15, 2004 (Add. Exh. 9); Schmidt Report, *supra* at II. When the agent asked the cause of this treatment, the interrogators responded that "the detainee had been chanting the Koran and would not stop." *Id.*

Guards, further, have burdened the prisoners' religious practices by manipulating the hours when prisoners pray:

> They play the call to prayer over the public address system at the wrong times and sometimes they do not play it at all. The guards have recently increased their efforts to disrupt prayer, by raising their voices as if they were kids playing with a new toy. They also make other noises at time of prayer, like increasing the volume of the fans, talking louder, or running races in the corridor. It is childish. At other times in the day it is totally quiet, and it is often very difficult to find a guard when we need help.

Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Sliti v. Bush*, Civ. No. 05-cv-429, 21 (RJL) (D.D.C. Aug. 29, 2005).

In addition to the daily interruptions of prayer, the guards inhibit the prisoners' annual religious practices, as described by current Guantánamo prisoner Sami al Haj:

> I have been in Guantánamo for 12 Eids[7] now, and I have learned after each one that not once have I been told the correct day. This is particularly important for Eid-al-Adha, because we are obliged to fast on the day before. I have been in Guantánamo for five Ramadans as well, and I have not been

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[7] Eid is a holy day in the Muslim calendar and marks the end of Ramadan.

> told the correct start or end dates either. It would be very easy to do, and we have requested one week's notice of each holiday, without response.

Mem. Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007, pg. 3 (Add. Exh. 2). An essential aspect of a Muslim's daily prayer involves praying at the appropriate times, both during the day and throughout the year. However, these accounts indicate that the guards in Guantánamo have turned this religious requirement into a farce, overtly disrespecting the prisoners' faith-based practices and imposing a substantial burden on their daily prayers in contravention of the express language and purpose of RFRA.

During their detention and interrogation, prisoners have been chained in a fetal position, a practice referred to as "short-shackling," which is not only extraordinarily painful, but also constitutes a total inhibition on the ability to pray:

> I entered interview rooms to find a detainee chained hand and foot in a fetal position on the floor, with no chair, food, or water. Most times they had urinated or defacated [sic] on themselves, and been left there for 18, 24 hours or more.

FBI Investigation Report, August 2, 2004, *available at http://www.aclu.org/torturefoi/released/FBI.121504.5053.pdf* (last visited March 10,2007) (Add. Exh. 4). In this position, prisoners are unable

to stand and bow, as is required under the tenets of Islam. Nor are they able to perform the ablutions as a prerequisite to prayer. Reports of prisoners chained to the floor and kept in a state of abject filth, indicate that a substantial burden has been placed on prisoners' religious practice by military officials: according to Muslim law, Muslims must pray in a state of cleanliness.

B. Desecration of the Koran and Misuse of Religious Materials

The most widely reported religious abuses in Guantánamo concern desecration of the Koran. Intentional mistreatment of the holy book of Islam not only constitutes a clear violation of RFRA, but it also symbolizes a profound lack of respect for the prisoners in general and has been the cause of several non-violent protests by prisoners against these violations of religious practices. *See, e.g.*, Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Stiti v. Bush*, Civ. No. 05-cv-429, 21 (RJL) (D.D.C. Aug. 29, 2005).

1. Desecration of the Koran

Reports of desecration of the Koran cover a wide range of acts by prison guards and interrogators. In a report that documents nearly fifty allegations of desecration of the Koran, in Guantánamo and other US-run facilities, the following statement describes some of examples of treatment of the Koran by the guards:

> They urinated over it, they ripped it; they cut it with scissors in front of us. They defecated on it ... One day, and in the Red Cross presence, they took all the Qur'ans of the prison to rip them in front of all of us. They behaved as regards to this noble Book as if it were a vulgar object.

Cageprisoners, *Report into the Systematic and Institutionalised US Desecration of the Qur 'an and other Islamic Rituals. Testimonies of Guantánamo Bay Detainees,* Statement of Mohamed Mazouz (2005), *available at http://www.cageprisoners.com/downloads/USQuranDesecration.pdf* (last visited March 10, 2007).

Other documentation contains descriptions of guards and interrogators "regularly defiling the Qur'an by touching it intentionally, dropping it, stepping on it, and throwing it on the ground." CCR Torture Report. *supra* at 25. Such acts were confirmed in a US military investigation into mistreatment of the Koran, which confirmed the following incidents: "guards at Camp X-ray kicked the Koran of a detainee," "Korans were wet because the night shift guards had thrown water balloons on the block," a guard wrote a "two word obscenity" in a Koran, and a guard stepped on a detainee's Koran during an interrogation. United States Southern Command, *Koran Inquiry: Description of Incidents,* June 3, 2005, *available at http://usinfo.state.gov/dhrlArchive/2005/Jun/06-17154.html* (last visited March 6, 2007). In another incident confirmed by the military investigation, a

guard urinated near an air vent in the camp, and splashed urine on the detainee inside and his Koran. *Id.*

2. Misuse of Religious Materials

In addition to acts specifically targeting the Koran, the manipulation of the prisoners' religious items in Guantánamo unequivocally violates RFRA and places a substantial burden on the prisoners' ability to practice Islam.[8] For example, guards have designated the Koran as a "comfort item" of the prisoners, which they have the power to withhold, and have confiscated it, along with other religious items, as punishment for a prisoner's failure to cooperate. This occurs even in interrogation in which interrogators make the prisoners dependent on their inquisitors for access to their holy book. *See* CCR Torture Report, *supra* at 25; *see also* Mem. Department of Defense Joint Task Force 170, Oct. 11, 2002 *reprinted in* The Torture Papers: The Road to Abu Ghraib 225-26 (Karen J. Greenberg & Joshua L Dratel eds., 2005) ("The Torture Papers") (authorizing the "removal of all comfort items (including religious items)").

Similarly, prisoner Saifullah Paracha was denied access to a Bible - a holy book under the tenets of Islam - despite numerous requests. Petitioner's Mot. To Be Allowed A Bible and Other Books, *Paracha v. Bush,* No. 04-cv-02022-PLF

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[8] Regulations governing federal prisons also require that prison staff "shall provide the inmate opportunity to possess religious scriptures of the inmate's faith." 28 C.F.R. 541.21.

(D.D.C. Nov. 1, 2005). Mr. Paracha was held in solitary confinement for nearly a year, without access to a military chaplain. *Id.*[9] He brought a suit for a preliminary injunction under RFRA to obtain a Bible and to be allowed to attend a religious service, both of which had been denied to him for three years. Petitioner's Mot. For Preliminary Injunction Under Religious Freedom Restoration Act, *Paracha v. Bush,* No. 04-cv-02022-PLF (D.D.C. Sept. 22, 2006). Thus far, he has not been able to secure judicial relief for this rather modest but critical request. *See also* Mem. Clive Stafford Smith, *supra* at 3 (recording lack of "books about how to pray," about "the history of the Prophet," and a disproportionate number of Shia, rather than Sunni books).

This clear misuse of the religious books and articles of the prisoners constitutes a significant burden on their ability to practice Islam. These acts also strike at the core symbols of Islam, igniting outrage in Muslim communities across the globe. *See, e.g.,* Afghan Riot of Reports of Koran Abuse, International Herald Tribune, May 11, 2005, *available at http://www.iht.com/articles/2005/05/11/africa/web.0511afghanphp* (last visited March 10, 2007). These abuses therefore are not only unequivocal violations of RFRA, but are also powerful statements of disrespect to the religion of Islam as a whole.

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[9] Guantánamo has been without a Muslim chaplain for three years, since Chaplain James Yee was removed from the facility.

C. Forced Undressing

The Muslim tenet of modesty requires that men be covered from the waist to the knees at all times, a requirement that is particularly important during prayer. Some of the cruelest, most inhuman, and degrading treatment of the prisoners in Guantánamo involves the forcible undressing of prisoners, without any stated or conceivable justification, explicitly in order to prevent them from praying.

As recounted by his counsel, former Guantánamo prisoner Ait Idir's experience demonstrates unequivocal abuse of this requirement of Islam, and also the US soldiers' awareness of the religious obligations of the prisoners:

> Knowing that Arab men are required to be clothed while praying, military police ordered all 48 prisoners in Romeo Block to give up their pants. Mr. Ait Idir told the guards that, as a Muslim, he would be unable to pray without his pants on, and so he begged them not to force him to undress. He offered them his shoes only. The guards threatened to use force. A colonel ... told him the IRF [Immediate Reaction Force] would forcibly take his pants. The Colonel would make no accommouation to allow [Idir] to pray in his pants. Mr. Aidit Idir offered to give up the pants if the officer promised to return them for prayers. The officer said the pants would not be

> returned for prayers ... As threatened, the IRF came. Before entering, they sprayed tear gas into his cell.

CCR Torture Report, *supra* at 27 (2006). "Prisoners," according to another report, "continue to be held in only their shorts, because the authorities know that this is inappropriate and humiliating for a Muslim." Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Sliti v. Bush,* Civ. No. 05-cv-429, 21 (RlL) (D.D.C. Aug. 29, 2005). As a 2002 FBI Report noted, as early as March 2002, the Military Police at Guantánamo were aware that, "in the Muslim culture, people do not get dressed, shower, or use the bathroom in front of others; however, they are being forced to do so." FBI Special Agent Report, April 6, 2002 *available at http://www.aclu.org/torturefoia/released/052505/index_orig.html* (Add. Exh. 5). Prisoners are not deprived of their trousers for security reasons, but, rather, are forced to undress specifically to prevent their prayer.

D. Forced Shaving

Regular and on-going reports of demeaning treatment of the prisoners and their religious practices include reports of guards forcibly shaving prisoners' heads and beards, sometimes as a punishment for vague allegations or for failure to cooperate. *See, e.g,* FBI Investigation Report, April 8, 2003 (Add. Exh. 6). In at least two instances, the guards shaved crosses into the prisoners' heads, forcibly compelling them to wear the insignia of another religion. Department of Defense Records, Substantiated Cases of Misconduct at JTF-GTMO,

July 19, 2005, *available at http://action.aclu.org/torturefoia/released/072605/* (Add. Exh. 7).

Such acts unambiguously focus on the beard as a symbol of Islamic culture and religious practice. Furthermore, they continue in Guantánamo to this day. Mem. Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007 (Add. Exh. 2) ("They shave off our beards when we are punished").

E. Sexual Abuse Targeting Islam

The reports of sexual abuse demonstrate guards explicitly targeting the Muslim tenets of modesty and cleanliness. The following examples from the abusive interrogation of Mr. Mohammed al-Qahtani - a prisoner currently held in Guantánamo demonstrates the extent of this kind of sexual abuse. Mr. al-Qahtani was forced to wear a woman's bra and had a thong placed on his head during the course of interrogation; he was forced to stand naked for five minutes with females present; he was laid out on the floor and straddled by a female interrogator; and in another incident he was forced to undergo a "dance instruction" with a male interrogator. Decl. of Gitanjali S. Guttierrez, Attorney for Mohammed al-Qahtani, 17-18, *available at http://www.ccr-ny.org/v2/GermanCase2006/Germancase.asp* (last visited March 10, 2007); *see also* Schmidt Report, *supra* at 1-2. Furthermore, the interrogation log concerning Mr. al-Qahtani lists ten incidents where he became agitated at the presence of a woman, or at the inappropriate sexual touching

to which he was subjected. Decl. Gitanjali S. Guttierrez, *supra* at 17.[10]

These forms of sexual abuse have often been combined with physically violent interrogation techniques, as the following report describes:

> [An FBI Special Agent] observed [redacted] position herself between the detainee and the surveillance camera monitor. The detainee was shackled and his hands were cuffed to his waist. [Special Agent] observed [redacted] apparently whispering in the detainee's ear, and caressing and applying lotion to his arms (this was during Ramadan when physical contact with a woman would have been particularly offensive to a Moslem male). On more than one occasion the detainee appeared to be grimacing in pain, and [redacted]'s hands appeared to be making some contact with the detainee. Although SA could not see her hands at all times, he saw them moving towards the detainee's lap ... SA asked what had happened to cause the detainee to grimace in pain. The marine said [redacted] had grabbed the detainee's thumbs and bent them backwards and

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[10] *See also,* Adam Zagorin & Michael Duffy, Inside the Interrogation of Detainee 063, Time Magazine, June 12, 2005, *available at http://www.time.com/time/magazine/article/0,9171,1071284,00.html* (last visited March 10, 2007).

indicated that she had also grabbed his genitals.

Letter from T. J. Harrington, Deputy Assistant Director, Counter terrorism to Major General Donald J. Ryder, DOA Criminal Investigation Command re: Suspected Mistreatment of Detainees, July 14, 2004 *available at http://www.aclu.org/torturefoia/released/010505.html* (Add. Exh. 8); *see also* Schmidt Report, *supra* at 1-2.

These sexual abuses evidence some of the clearest violations of the prisoners' rights; not only are prisoners subjected to acts of physical torture, but the mistreatment specifically targets the religious convictions and practices of the prisoners.

III. RELIGIOUS ABUSE IN VIOLATION OF RFRA IS STANDARD PRACTICE AT GUANTÁNAMO

From January 2002, when the first prisoners arrived in Guantánamo, to today, reports concerning the systematic, pervasive violations of the prisoners' religious rights demonstrate the existence of a pattern, practice and policy of the guards at the camps and their superiors in Guantánamo, the Southern Command, and in Washington. Far from being the acts of rogue low-level perpetrators on the base, the recorded abuses occurred within a well-documented policy framework in which former Secretary of Defense Donald Rumsfeld and other top officials in the chain of command over subordinate soldiers at Guantánamo sanctioned the violation of the prisoners' religious rights and failed to punish

such violations when they occurred. A ruling granting qualified immunity to defendants in this case would effectively condone a policy that specifically targeted the religious beliefs of the prisoners through degradation, manipulation, and violence. Further, it would constitute a green light to continue these practices in the future. The individual liability attached to the RFRA claims in the present case represents one of the only meaningful ways the current prisoners can demand accountability for acts committed in Guantánamo and former detainees can seek redress for the injuries caused by these violations.

In October 2002, the Department of Defense issued a set of suggested guidelines for interrogation, which included as so-called Category II techniques, the "removal of all comfort items (including religious items) ... removal of clothing ... [and] forced grooming (shaving of facial hair etc....)." Mem. for Commander, Joint Task Force 170, Department of Defense, Oct. 11, 2002 *reprinted in* The Torture Papers: The Road to Abu Ghraib 227-28 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) ("The Torture Papers"). In December 2002, Donald Rumsfeld signed the approval of these techniques, which had been outlined in November in a memo by William J. Haynes. Mem. re: Counter Resistance Techniques, Office of the Secretary of Defense, Nov. 27, 2002 *reprinted in* The Torture Papers, *supra* at 237. In January 2003, Rumsfeld rescinded the December general approval of Category II techniques. Therenfter, such techniques were not explicitly forbidden, but required his personal approval for their use. Mem. for Commander

USSOUTHCOM re: Counter-Resistance Techniques, January 15, 2003, *reprinted in* The Torture Papers, *supra* at 239.

However, in April 2003, Rumsfeld again authorized the use of interrogation techniques that would unequivocally have the effect of inhibiting the prisoners' religious practices. These techniques included "forced grooming (forcing a detainee to shave hair or beard)" and "removal of clothing (potential removal of all clothing; removal to be done by military police if not agreed to by the subject)." Mem. from the Commander, US Southern Command re: Counter Resistance Techniques in the War on Terrorism, April 16, 2003 *reprinted in* The Torture Papers, *supra* at 360. As Professor Joseph Margulies points out, another important aspect of this order is that it "allows interrogators to use *any* interrogation technique, even those not listed in the order, so long as they get prior approval from the secretary of defense." Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 107 (2006).

A 2005 investigation into alleged abuses at Guantánamo demonstrates how easily these approved techniques were used to violate the prisoners' religious rights. For example, in response to the allegation that "female military interrogators performed acts designed to take advantage of their gender in relation to Muslim males," the Report found that such behavior was authorized as "noninjurious touching," specifically permitted by defendant Rumsfeld as a Category III technique. Schmidt Report, *supra* at 7. During 2002 and 2003, several reports of such "non-injurious" touching,

included reports of female interrogators touching prisoners, rubbing lotion on their arms and legs, and in at least one instance, smearing a prisoner with red ink and telling him it was menstrual blood, all exemplars of extreme religious abuse. *Id.* at 8.

Faced with continued violation of their religious rights, and in response to several reports of desecration of the Koran in Guantánamo, the prisoners organized two major hunger strikes, one in 2002 and another in 2005. Center for Constitutional Rights, *The Guantánamo Prisoner Hunger Strikes & Protests (2005) available at http://www.ccr-ny.org/v2/legal/September_11th/docs/Gitmo_Hunger_Strike_Report_Sept_2005.pdf* (last visited Feb. 26, 2007).[11] Reports of mistreatment of the Koran in 2005 also triggered large protests, and broad condemnation by Muslim communities around the world. N.C. Aizenman, Afghan *Protests Spread,* Washington Post, May 14, 2005, at *A01.*

Following the hunger strike in 2005, a US military inquiry confirmed several instances of defilement of the Koran. United States Southern Command News Release, Koran Inquiry: Description of Incidents, June 3, 2005, *available at*

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[11] *See also Watching Over the World's Most Infamous Prisoners,* Newhouse News Service, March 22, 2002 ("The protests began Feb. 27, a day after an Army guard removed a turban from the head of a detainee who said he was praying"); *Guantánamo Inmates on Hunger Strike,* Al Jazeera Online (July 22, 2005) ("The prisoners are demanding ... greater respect for their religion-including an end to desecration of the Qu'ran") *available at http://englishaljazeera.net/NR/exeres/1AFAF53F-2A54-43B5-A049-9B673AF6D241.htm* (last visited March 10, 2007).

www.globalsecurity.org/security/library/report/2005/pr050603a.pdf (last visited March 6, 2007). This inquiry found nine incidents, and five confirmed incidents of intentional and unintentional mishandling of the Koran. *Id.*

Despite these findings by the US government, the abuses continue today. As recently as March 2007, detainees continue to report mistreatment of the Koran, interruption of prayer, and acts of sexual degradation in Guantánamo. Mem. of Clive Stafford Smith, Counsel for Sami al Haj, March 4, 2007 (Add. Exh. 2) (stating that female guards are present during showers, prisoners "continue to be forced to expose the private parts of [their] bodies," guards "manhandle" the Koran, guards talk loudly during prayer times, and prisoners are punished for fasting according to their faith); *see also* Mot. for a Prelim. Inj. Concerning Conditions of Confinement, *Sliti v. Bush,* Civ. No. 05-cv-429, 2 I-23 (RJL) (D.D.C. Aug. 29, 2005) (alleging deliberate interruption of prayer, mistreatment of the Koran, and forced undressing). Notwithstanding these many allegations, countless reports, and widespread protests, the standard procedure in Guantánamo continues to be one of religious abuse, humiliation, and violence. There has been no meaningful change in policy towards the religious rights of prisoners in US custody in Guantánamo. Further, the passage of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), evidences the clear intent of the US government not only to eviscerate the prisoners' rights, including religious rights under RFRA, but to preclude any avenues for them for judicial review of and redress for their mistreatment.

This failure to protect the clearly established rights of prisoners in the face of overwhelming evidence of serious abuses of religious practices is symptomatic of a culture of impunity that pervades Guantánamo: guards, interrogators, and officials have acted in clear contravention of the prisoners' religious rights and in a manner specifically designed to demean and humiliate them. The reports discussed above unmask the defendants' argument regarding qualified immunity as disingenuous: no reasonable official in Guantánamo could imagine that these kinds of abuses fell within any conceivable moral or legal framework. *See Rasul v. Rumsfeld,* 433 F. Supp. 2d 58, 69 (D.D.C. 2006) ("given the abhorrent nature of the allegations and given 'our Nation's fundamental commitment to religious liberty,' it seems to this court that in this case 'a reasonable official would understand that what he is doing violates that right'") (internal citations omitted). Those at the highest level of command, similarly, knowingly encouraged policies which were outtrageous violations of the religious rights of the detainees. With such widespread documentation of the abuses at Guantánamo, it is particularly important to preserve legal recourse for the detainees and their counsel in order to protect their religious rights. Such rights unarguably exist in Guantánamo and are clearly protected under RFRA.

CONCLUSION

Amici are deeply concerned by these reports of serious violations of prisoners' religious rights in Guantánamo and call upon the court to recognize, not only the clear applicability of RFRA to this situation, but also to acknowledge the defendants' evil, insidious, and outrageous conduct alleged in the complaint and supported by independent reports. The defendants, from the highest level of command to the lowest private, cannot possibly invoke any privilege to treat their wards with such extreme disregard for their religious practices, and beliefs. *Amici* draw the Court's attention to incidents in the public record in order to demonstrate the widespread nature of the attacks on the prisoners' religious practices and to highlight the profound impact of a reversal of the decision below denying U.S. officials' qualified immunity. *Amici,* therefore, request the Court uphold the decision below, recognize plaintiffs' clearly established rights under RPRA and deny defendants defense of qualified immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE

I hereby certify, pursuant to Fed. R. Add. P. 32 (a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 6,438 words, (which does not exceed the applicable 7,000 word limit).

/s/
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of March, 2007, the foregoing Brief Of *Amici Curiae* Counsel For Guantánamo Detainees, Reprieve, Cageprisoners, And James Vee In Support Of Plaintiffs-Appellants was served by U.S. mail, postage prepaid, upon the following:

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Supreme Court, U.S.
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No. 08-235

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

RICHARD MYERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, does not provide relief to aliens captured during a time of armed conflict and held outside the United States at Guantanamo Bay, Cuba.

2. Whether the court of appeals correctly held that respondents are entitled to qualified immunity on petitioners' constitutional claims.

3. Whether the court of appeals correctly held that the United States should be substituted for the individual defendants pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(b)(1).

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In the Supreme Court of the United States

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SHAFIQ RASUL, ET AL., PETITIONERS

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RICHARD MYERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-66a) is reported at 512 F.3d 644. The opinions of the district court (Pet. App. 71a-99a, 102a-145a) are reported at 433 F. Supp. 2d 58 and 414 F. Supp. 2d 26, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on January 11, 2008. A petition for rehearing was denied on March 26, 2008 (Pet. App. 146a-147a). On June 2, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 22, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the wake of the terrorist attacks of September 11, 2001, the President took immediate action to prevent additional attacks, and Congress swiftly approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001). The President ordered United States Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Although United States and allied troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat continues.

During that conflict, the United States, consistent with the law and settled practice of armed conflict, has seized many hostile persons and detained a small proportion of them as enemy combatants. A number of those individuals have been or are being held at the United States Naval Base at Guantanamo Bay, Cuba (Guantanamo).

b. Petitioners are four British citizens who were captured in Afghanistan in the months following September 11. Pet. App. 104a-105a, 165a-166a. According to the allegations in their complaint, which are not conceded but must be taken as true at this stage of the litigation, three of the petitioners were captured by a warlord in Afghanistan in November 2001 and turned over to the United States. *Id.* at 165a. The fourth petitioner alleges he was captured by the Taliban, released, and then detained by United States forces. *Id.* at 165a-166a. All four petitioners were transferred to Guantanamo in

early 2002 and released in March 2004. *Id.* at 167a, 207a.

2. After petitioners were released from United States custody and sent to the United Kingdom, they brought this civil action against then-Secretary of Defense Donald H. Rumsfeld and ten other senior Department of Defense officials in their individual capacities. Petitioners alleged that they suffered inhumane treatment, some of which they allege constituted torture, at the hands of unidentified United States military personnel. Pet. App. 167a, 189a-207a. They also alleged that United States military officials infringed on the practice of their religion, at times interfering with their prayers and withholding or desecrating copies of the Koran. *Id.* at 223a. Petitioners alleged that their mistreatment "was not simply the product of isolated or rogue actions by individual military personnel," because it stemmed from "deliberate and foreseeable" action taken to "coerce nonexistent information regarding terrorism." *Id.* at 168a-169a. They alleged that "[t]he torture, threats, physical and psychological abuse inflicted upon [petitioners] were devised, approved, and implemented by Defendant Rumsfeld and other [respondents] in the military chain of command. These techniques were intended as interrogation techniques to be used on detainees." *Id.* at 208a. Petitioners further alleged that respondents knew that petitioners were tortured or mistreated, "took no steps to prevent the infliction of torture and other mistreatment," and "authorized and encouraged the infliction of torture and other mistreatment against [petitioners]." *Id.* at 212a-213a.

Petitioners' complaint sought relief under the Alien Tort Statute (ATS), 28 U.S.C. 1350, for alleged violations of international law (Counts 1-3). Pet. App. 214a-

218a. Petitioners also claimed that respondents had violated unspecified provisions of the Third and Fourth Geneva Conventions (Count 4), *id.* at 218a-219a, the Fifth and Eighth Amendments to the United States Constitution (Counts 5 and 6), *id.* at 219a-222a, and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* (Count 7), Pet. App. 222a-224a.

Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(b)(1), the Attorney General (through his designee) certified that, "at the time of the conduct alleged in the complaint," the individual respondents "were acting within the scope of their employment as employees of the United States," and substituted the United States for the individual respondents on the claims for violation of the ATS and the Geneva Conventions. C.A. App. 60; see 28 U.S.C. 2679(b)(1) (making a suit against the United States the exclusive remedy for seeking money damages for the wrongful act or omission of a Government employee acting in the scope of employment). Respondents moved to dismiss those counts because petitioners had not exhausted their administrative remedies. Respondents also moved to dismiss the constitutional and RFRA claims on the basis of qualified immunity.

3. a. In its initial decision, the district court deferred consideration of the RFRA claim but granted respondents' motion to dismiss the other claims. Pet. App. 100a-146a. On the international law claims (under the ATS and the Geneva Conventions), the court held that the United States had been properly substituted for the individual defendants. *Id.* at 110a-111a. Applying the *respondeat superior* law of the District of Columbia, the court held that respondents were acting within the scope

of their employment when the alleged acts occurred. The court determined that the United States had "authorized military personnel in Guantanamo to exercise control over the detainees and question the detainees while in the custody of the United States," and that "the complaint points to actions which arose specifically from authorized activities." *Id.* at 119a. After substituting the United States, the court dismissed the claims because petitioners had not exhausted their administrative remedies under the Federal Tort Claims Act (FTCA), ch. 753, Tit. IV, 60 Stat. 842. Pet. App. 130a-131a.

b. On the constitutional claims, the district court held that respondents are entitled to qualified immunity. Pet. App. 131a-143a. The court declined to determine whether petitioners had alleged constitutional violations, holding that respondents are entitled to qualified immunity because any constitutional rights with respect to Guantanamo detainees were not clearly established at the time of the conduct. *Id.* at 134a-143a.

c. After supplemental briefing, the district court addressed petitioners' RFRA claim and denied respondents' motion to dismiss. Pet. App. 70a-99a. Noting that the statute extends by its terms to "each territory and possession of the United States," 42 U.S.C. 2000bb-2(2), the court held that Guantanamo is a "possession" of the United States within the meaning of the statute. Pet. App. 81a-83a. The court then held that RFRA applies to non-resident aliens like petitioners because aliens detained at Guantanamo are "persons" for purposes of RFRA. *Id.* at 88a-89a. It also held that respondents are not entitled to qualified immunity on the RFRA claim because the rights of Guantanamo detainees under RFRA were clearly established at the time of petitioners' detention. *Id.* at 94a-99a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-66a.

a. The court of appeals first held that petitioners' claims against the individual respondents under the ATS were properly dismissed pursuant to the Westfall Act. Applying D.C. law concerning the scope of employment, the court concluded that, taking the allegations in the complaint as true, respondents had acted within the scope of their employment. Pet. App. 21a-32a. In particular, it concluded that "the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct [respondents] were employed to engage in." *Id.* at 25a-26a. The court noted that, while petitioners "challenge[d] the methods [respondents] used to perform their duties," they did "not allege that [respondents] acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence." *Id.* at 26a.

Because respondents' alleged conduct fell within the scope of employment for purposes of the Westfall Act, the court of appeals held that the ATS claims were properly restyled as claims against the United States under the FTCA. Pet. App. 30a. The court then held that the district court correctly dismissed the FTCA claims because petitioners had not exhausted their administrative remedies. *Id.* at 31a-32a.[1]

For the same reason, the court of appeals affirmed the dismissal of petitioners' claim under the Geneva Conventions. It held that the alleged conduct falls within the scope of employment, and a suit against respon-

[1] Noting that the legal issue could be decided on the basis of petitioners' allegations, the court of appeals also held that the district court did not abuse its discretion in denying petitioners' request for discovery on the scope of employment. Pet. App. 33a-34a.

dents is precluded by the Westfall Act. Pet. App. 34a-35a.

b. The court of appeals affirmed the dismissal of petitioners' *Bivens* claims asserting violations of their Fifth and Eighth Amendment rights. Pet. App. 36a-44a. The court observed that it had recently held in *Boumediene* v. *Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007), rev'd, 128 S. Ct. 2229 (2008), that detainees at Guantanamo lack constitutional rights because they are aliens without property or presence in the United States. Pet. App. 36a-37a.

The court of appeals also held that "[e]ven assuming *arguendo* the detainees can assert their Fifth and Eighth Amendment claims, those claims are nonetheless subject to [respondents'] assertion of qualified immunity." Pet. App. 41a. The court observed that, even before its decision in *Boumediene*, "courts did not bestow constitutional rights on aliens located outside sovereign United States territory." *Id.* at 42a. The court also held that, "[b]ased on the plain text of the lease [between the United States and Cuba] and on case law, it was not clearly established at the time of the alleged violations * * * that a reasonable officer would know that Guantanamo is sovereign United States territory." *Id.* at 44a.

c. The court of appeals held that the district court erred in denying respondents' motion to dismiss the RFRA claim. Pet. App. 45a-54a. Finding it unnecessary to address whether RFRA generally applies extraterritorially, the court determined that petitioners are not "persons" covered by the statute. *Id.* at 45a-46a.

The court of appeals noted that, while RFRA's text does not define "person," under various constitutional provisions the term does not include non-resident aliens. Pet. App. 47a. Because RFRA's purpose was "to restore

what, in the Congress's view, is the free exercise of religion guaranteed by the Constitution," the court determined that "'person' as used in RFRA should be interpreted as it is in constitutional provisions." *Id.* at 52a. The court noted that this Court had previously held that German nationals held in Germany were not "persons" under the Fifth Amendment, *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950), and that the term "people" as used in the Fourth Amendment does not include non-resident aliens, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Pet. App. 53a. Thus, the court concluded that "RFRA's use of 'person' should be interpreted consistently with the Supreme Court's interpretation of 'person' in the Fifth Amendment and 'people' in the Fourth Amendment to exclude non-resident aliens. Because the plaintiffs are aliens and were located outside sovereign United States territory at the time their alleged RFRA claim arose, they do not fall with[in] the definition of 'person.'" *Id.* at 54a (footnote omitted).[2]

d. Judge Brown concurred. Pet. App. 55a-66a. She agreed that the ATS and Geneva Convention claims must be dismissed. *Id.* at 55a. She also agreed that the *Bivens* claims for constitutional violations were properly dismissed, but she reached that conclusion without addressing the applicability of the Fifth and Eighth Amendments to Guantanamo detainees. Judge Brown would have held that special factors counsel hesitation in the creation of a *Bivens* remedy in this context, relying on circuit precedent refusing to allow a *Bivens* ac-

[2] The court declined to determine whether qualified immunity is available for claims brought under RFRA, but noted that "[b]oth the Supreme Court and our court have recognized qualified immunity is available to counter not only constitutional claims but also certain statutory claims." Pet. App. 46a n.20.

tion "for Nicaraguans who brought claims against U.S. government officials for supporting the Contras" because it would have significant national security and foreign policy implications. *Id.* at 55a-58a (discussing *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985)).

Judge Brown also concurred in the majority's holding that the RFRA claim must be dismissed, but for different reasons. She disagreed with the panel's holding that the term "person," as used in RFRA, did not apply to nonresident aliens. Pet. App. 59a-63a. Yet, she concluded that other factors left no doubt that Congress did not intend for RFRA to apply to petitioners. *Id.* at 63a. Even if that were not true, she "would have no trouble concluding [respondents] are protected by qualified immunity," because RFRA's application to aliens like petitioners was not clearly established. *Id.* at 63a-65a. Judge Brown concluded that "[a]ccepting [petitioners'] argument that RFRA imports the entire Free Exercise Clause edifice into the military detention context would revolutionize the treatment of captured combatants in a way Congress did not contemplate." *Id.* at 65a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with decisions of this Court or any other court of appeals. The court of appeals reasonably concluded that military detainees could not impose personal monetary liability on the Nation's military commanders for overseas conditions of confinement during a time of war. At the very least, any such right was not clearly established at the time of petitioners' detention in Guantanamo. Nor is this case the proper vehicle for addressing the application of RFRA to aliens outside the United States

or whether the Fifth and Eighth Amendments apply to Guantanamo detainees. Because respondents here will in any event be entitled to qualified immunity with respect to the RFRA and constitutional claims, the petition for a writ of certiorari should be denied.

1. The court of appeals' holding that petitioners' RFRA claim was correctly dismissed (Pet. App. 45a-54a) does not warrant this Court's review.

a. The court of appeals correctly held that RFRA does not apply to aliens detained at Guantanamo. RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). RFRA also gives a statutory right of action to a "person whose religious exercise has been burdened." 42 U.S.C. 2000bb-1(c).

The statute does not define the term "person." Nor does it specify that the term includes aliens outside the sovereign territory of the United States. Petitioners insist that the term should be read expansively to cover any individual anywhere under any circumstances—an interpretation that would apply not just to Guantanamo detainees, but to any detainee held in any detention facility during any war. As Judge Brown recognized in her concurring opinion, such a holding "would revolutionize the treatment of captured combatants in a way Congress did not contemplate." Pet. App. 65a. It would allow wartime detainees to sue and recover money from their captors during an ongoing war.

The court of appeals correctly concluded, on the basis of statutory context, that Congress did not intend for

RFRA to apply to such aliens. Pet. App. 48a-49a. As its title indicates, the Religious Freedom Restoration Act was intended to *restore* free exercise rights for those who previously had them—not to create new rights that had never previously been recognized. RFRA was enacted in response to this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), which held that a generally applicable law may burden a religious exercise even when the government does not demonstrate a compelling interest for its rule. *Id.* at 884-889. As the statutory text plainly says, Congress's express purpose in RFRA was to "*restore* the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)." 42 U.S.C. 2000bb(b)(1) (emphasis added).[3]

The legislative history is equally clear in expressing Congress's expectation that courts would look to pre-*Smith* cases to apply RFRA. See H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993); see also *id.* at 9 ("the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*"); *id.* at 2 (the Act "responds to the Supreme Court's decision in * * * *Smith* by creating a statutory prohibition against government action substantially burdening the exercise of religion") (footnote omitted). As the Senate Report stated, "the purpose of this act is *only* to over-

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[3] A second purpose articulated in the statute, to "provide a claim or defense to *persons* whose religious exercise is substantially burdened by government," 42 U.S.C. 2000bb(b)(2), merely begs the question presented here: whether aliens abroad are "persons" whose religious exercise may not be burdened except by meeting the compelling-interest standard.

turn the Supreme Court's decision in *Smith*." *Id.* at 12 (emphasis added).

In light of the expressly stated purpose of Congress simply to restore the compelling-interest test for pre-existing free exercise claims, the court of appeals correctly held that the "person[s]" protected by RFRA are those who had recognized constitutional rights at the time RFRA was enacted. Pet. App. 48a-49a. Petitioners do not dispute that when Congress enacted RFRA, it had long been established that aliens outside United States territorial jurisdiction who lacked a substantial connection to the United States were not entitled to First Amendment protections. See *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904) (*Turner*); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Indeed, applying those principles in 1995, the Eleventh Circuit specifically held that aliens *at Guantanamo* could not assert First Amendment rights. *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1429-1430, cert. denied, 515 U.S. 1142, and 516 U.S. 913 (1995).

The courts had also made clear that the "people" protected by the Fourth Amendment are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265; see *Turner*, 194 U.S. at 292 (an excludable alien is not entitled to First Amendment rights because the alien "does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). Courts had also uniformly held that aliens "outside the sovereign territory of the United States" are not "person[s]" under the Fifth Amendment. See *Verdugo-Urquidez*, 494 U.S. at

269; *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005); *Peoples Mojahedin Org.* v. *United States*, 182 F.3d 17, 22 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000).[4]

Because RFRA merely "restore[d] the compelling interest test as set forth in Sherbert," 42 U.S.C. 2000bb(b)(1), and because that test afforded no protection to aliens abroad who lacked a substantial connection to the United States, it follows that Congress did not intend that the definition of "person" in RFRA extend to those aliens. Petitioners' argument to the contrary would create a result demonstrably at odds with the context of the statute and the express intent of Congress.

b. Petitioners contend (Pet. 19-20) that RFRA does not simply duplicate pre-existing constitutional protections, but instead extends First Amendment-like protections "to religious practices" that had previously been held unprotected under the First Amendment. In support of that contention, petitioners note that RFRA applies to prison inmates and military personnel, overruling cases such as *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), and *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

But nothing in RFRA purported to extend its reach to *persons* who were not previously covered by the First

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[4] While the Court in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), held that the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, applied to aliens on a United States military base in Bermuda (and likened that base to Guantanamo), it also made it clear that analysis of the geographic application of a statute "depends upon the purpose of the statute." *Id.* at 378, 390. In light of RFRA's purpose to restore the pre-*Smith* standard for free exercise claims, *Vermilya-Brown*'s discussion of the status of Guantanamo does not establish that RFRA applies to aliens detained there.

Amendment. Residents of the United States seeking to use narcotics for religious purposes (as in *Smith*), military personnel seeking to wear yarmulkes (as in *Goldman*), and prison inmates seeking to attend religious services (as in *O'Lone*) had always had First Amendment rights. RFRA merely ensured that their free exercise claims would be adjudicated under the pre-*Smith* compelling-interest standard. Nowhere does the statute suggest that Congress intended to give rights to persons who never had First Amendment rights in the first instance.[5]

c. Petitioners mischaracterize the court of appeals' decision as holding that "because Guantánamo detainees have no constitutional rights (a blanket proposition rejected by this Court in *Boumediene*), they also have no rights under RFRA." Pet. 17-18 (citation omitted). That is not what the court of appeals held. Instead, it held that Congress intended to incorporate the pre-*Smith* standard governing free exercise claims, and intended RFRA's application to "person[s]" to include individuals who had recognized free exercise rights. Pet. App. 48a-49a.

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[5] Citing a brief from 1997, petitioners claim (Pet. 20-21) that the United States has previously argued that "RFRA expressly supplements and extends protection to religious practices that may not be covered by the Constitution." In fact, the passage they cite from the earlier brief simply noted (and cited cases supporting the proposition) that RFRA created a "statutory right" rather than "new constitutional rights." U.S. Br. at 36-37 & n.40, *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (No. 95-2074). Of course RFRA protects "religious practices that may not be covered by the Constitution" (Pet. 20) as interpreted since *Smith*. But that does not mean that Congress intended the new statutory right to extend to practices that had *never* been seen to be protected by the First Amendment under the compelling-interest test.

As petitioners acknowledge (Pet. 22), the application of RFRA is a statutory question about congressional intent, and not simply a determination of the current state of the Constitution's application to aliens at Guantanamo. Thus, the reach of this Court's decision in *Boumediene* is not controlling, because it does not resolve the question of congressional intent as to RFRA. Even if *Boumediene*'s Suspension Clause holding were extended to the First Amendment, that would not change the fact that Congress enacted RFRA with the intent to limit its statutory entitlement to persons who had First Amendment rights before *Smith*.[6]

d. In any event, this case is not a suitable vehicle for addressing whether RFRA applies to alien detainees held at Guantanamo because respondents will be entitled to qualified immunity either way. See Pet. App. 64a (Brown, J., concurring). Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).[7] The doctrine of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but

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[6] The applicability of *Boumediene* to other constitutional provisions is at issue in several cases pending in the lower courts. See, *e.g.*, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C.) (Due Process); *Hamdan* v. *Gates*, No. 04-CV-1519-JR (D.D.C.) (Due Process, Ex post Facto, Bill of Attainder, Equal Protection); see also *Khan* v. *Gates*, No. 07-1324 (D.C. Cir.) (First Amendment).

[7] Petitioners do not dispute Judge Brown's observation (Pet. App. 64a n.5) that they "assumed that qualified immunity is available [on the RFRA claim] and * * * thus waived any argument to the contrary" (except by showing that the right they assert was clearly established).

the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).

To defeat qualified immunity, the right invoked must be "clearly established" at the time the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); see *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). It is not enough for a plaintiff to identify some generalized right that was established at the time of the relevant conduct. *Saucier*, 533 U.S. at 201-202. Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. While the *precise* conduct at issue need not have been previously held to be unlawful, its "unlawfulness must be apparent" in "light of pre-existing law." *Ibid.*; see *Mitchell* v. *Forsyth*, 472 U.S. 511, 535 n.12 (1985).

At the time petitioners were detained (between 2002 and March 2004), a reasonable official could have doubted, at a minimum, that RFRA granted rights to suspected enemy combatants captured on foreign soil and held at a military facility abroad during a time of war. As explained above, a reasonable official could have concluded from RFRA's text and legislative history that the statute was designed merely to restore the legal standard governing pre-existing free exercise rights. See, *e.g.*, S. Rep. No. 111, *supra*, at 12 ("[T]he purpose of this act is *only* to overturn the Supreme Court's decision in *Smith*.") (emphasis added); see also *Florida Pre-*

paid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627, 638 (1999) ("Through RFRA, Congress reinstated the compelling governmental interest test eschewed by *Smith*."). Moreover, a reasonable official would have been justified in relying on prior case law establishing that aliens outside the United States in general—and aliens *at Guantanamo* in particular—did not enjoy First Amendment rights. See, *e.g.*, *Verdugo-Urquidez*, 494 U.S. at 265; *Cuban Am. Bar Ass'n*, 43 F.3d at 1429-1430.[8]

2. The court of appeals' holding that petitioners' *Bivens* claims for alleged violations of the Fifth and Eighth Amendments were correctly dismissed (Pet. App. 36a-44a) does not warrant this Court's review.

a. Petitioners argue (Pet. 25-26) that the court of appeals' holding is inconsistent with this Court's subsequent decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008). But *Boumediene* did not hold that all provisions of the Constitution protect Guantanamo detainees. The

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[8] Certiorari is particularly unwarranted in light of the strength of respondents' argument that the right was not clearly established at the time they acted (an argument the court of appeals did not reach, see Pet. App. 47a n.20). Regardless of whether this Court overturns the requirement that lower courts conducting qualified-immunity analysis must decide whether a legal right exists before deciding whether that right was clearly established at the relevant time, see *Pearson* v. *Callahan*, 128 S. Ct. 1702, 1702-1703 (2008) (No. 07-751; argued Oct. 14, 2008), this Court has not felt itself bound to follow that framework, see *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam), and the fact that this alternative ground for rejecting petitioners' claims exists provides an independent basis for denying certiorari. Cf. *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("[T]his is a court of final review and not first view.") (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part)).

Court held only that Guantanamo detainees have a procedural right under the Suspension Clause to file a habeas petition and thus receive judicial review of "both the cause for detention and the Executive's power to detain." *Id.* at 2269. Moreover, *Boumediene* expressly noted that it did not address any "claims of unlawful conditions of treatment or confinement." *Id.* at 2274.[9] Indeed, the Court explained that "[i]t bears repeating that our opinion does not address the content of the law that governs petitioners' detention" (let alone their conditions of confinement). *Id.* at 2277. Rather, "[t]hat is a matter yet to be determined," because the Court "h[e]ld" only "that petitioners may invoke the fundamental procedural protections of habeas corpus." *Ibid.*

Thus, *Boumediene* did not overturn the Court's prior rulings that the individual-rights provisions of the Constitution run only to aliens who have a substantial connection to our country and not to enemy combatants who are detained abroad. In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), for instance, this Court had addressed whether aliens outside the sovereign territory of the United States possess "substantive constitutional rights" in general, *id.* at 781, and Fifth Amendment rights in particular, *id.* at 781-785, and it held that they

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[9] Petitioners' contention (Pet. 26) that *Boumediene* held that "the substantive guarantees of the Fifth and Fourteenth Amendments" apply to Guantanamo detainees is not supported by the passage they cite. In that passage, the Court merely acknowledged that separation-of-powers doctrine, "like the substantive guarantees of the Fifth and Fourteenth Amendments," protects "persons as well as citizens." 128 S. Ct. at 2246. It cited *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374 (1886), a case that involved aliens living in the United States. Accordingly, that passing statement cannot be read as a holding that the Fifth and Fourteenth Amendments always apply to aliens outside the United States.

did not, *id.* at 784-785. Later decisions reaffirmed that holding. See *Verdugo-Urquidez*, 494 U.S. at 269; *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"); *Jifry*, 370 F.3d at 1182; *32 County Sovereignty Comm.* v. *Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002). The court of appeals' decision remains correct following *Boumediene*.

b. In any event, this case is not a proper vehicle for determining the effect that *Boumediene* will have on Fifth and Eighth Amendment claims because—regardless of how that issue is resolved—the court of appeals correctly held, as an alternative basis for its decision, that respondents are entitled to qualified immunity on those claims because the applicability of the Fifth and Eighth Amendments to Guantanamo detainees was too unsettled at the time of petitioners' detention. Pet. App. 41a ("Even assuming *arguendo* [petitioners] can assert their Fifth and Eighth Amendment claims, those claims are nonetheless subject to [respondents'] assertion of qualified immunity."). See note 8, *supra*.

At the time of petitioners' detention (between 2002 and March 2004), it was, at a bare minimum, not clearly established that the Fifth and Eighth Amendments protected aliens detained abroad by the military. To the contrary, the case law uniformly held that aliens outside the sovereign territory of the United States did not have enforceable Fifth and Eighth Amendment rights. See pp. 18-19, *supra*.

Indeed, there were cases that specifically addressed the *lack* of constitutional rights for aliens at Guantanamo. The Eleventh Circuit had held that alien refugees

there had "no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n*, 43 F.3d at 1428. Perhaps most telling, the District of Columbia Circuit specifically concluded—during the period of petitioners' detention—that the Fifth Amendment does *not* apply to aliens held at Guantanamo. *Al Odah* v. *United States*, 321 F.3d 1134, 1140-1144 (2003), rev'd on other grounds *sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004). Even after this Court reversed *Al Odah* on statutory grounds, see *Rasul*, 542 U.S. at 476, district courts reached opposing conclusions about whether Guantanamo detainees had Fifth Amendment rights. See *Boumediene*, 128 S. Ct. at 2241 (describing district court opinions). In fact, more than four years after petitioners were released from United States custody, this Court recognized that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." *Id.* at 2262.

When "judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Accordingly, the court of appeals was correct in concluding that a reasonable officer would not have concluded that petitioners possessed Fifth and Eighth Amendment rights while they were detained at Guantanamo.

Petitioners assert (Pet. 31) that the court of appeals "relied on the absence of any constitutional ruling directly on point" in holding that the law was not clearly established. They further criticize (Pet. 33) the court of appeals for "approach[ing] the question of qualified immunity with a single, narrow question—was there a case holding torture at Guantánamo violated specific provi-

sions of the Constitution?" Although petitioners are correct that the absence of a ruling directly on point does not necessarily preclude a right from being clearly established, their characterization of the court of appeals' decision as relying upon the absence of a ruling on point is inaccurate. The court of appeals examined extensive authority that existed at the time of petitioners' detention and correctly determined that "Supreme Court and Circuit precedent, consistent with *Eisentrager*'s rejection of the proposition 'that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offense,' concluded that non-resident aliens enjoy no constitutional rights." Pet. App. 42a-43a (citing *Eisentrager*, 339 U.S. at 783; *Verdugo-Urquidez*, 494 U.S. at 269; *Jifry*, 370 F.3d at 1182; *People's Mojahedin Org.*, 182 F.3d at 22).[10]

Despite petitioners' claims to the contrary (Pet. 31-33), the court of appeals' decision is also consistent with *Hope* v. *Pelzer*, 536 U.S. 730 (2002), and *United States* v. *Lanier*, 520 U.S. 259 (1997). Those cases recognized that government officials can be on notice that their actions violate clearly established law "even in novel fac-

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[10] The court of appeals also discussed several relevant cases before concluding that "it was not clearly established at the time of the alleged violations—nor even today—that a reasonable officer would know that Guantanamo is sovereign United States territory." Pet. App. 44a. To the extent that this Court's later decision in *Boumediene* casts doubt on the earlier case law about places where the United States is not *de jure* sovereign, it does not address the question here because *Boumediene* held only that detainees have a procedural right to habeas corpus, see p. 18, *supra*, and *Boumediene* certainly provides no basis for denying qualified immunity. It is axiomatic that federal officials cannot be held liable based on later developments in the law. See, *e.g.*, *Anderson*, 483 U.S. at 640.

tual circumstances," *Hope*, 536 U.S. at 741, or in a kind of case with facts so extreme that the issue does not "even arise" in other cases, *Lanier*, 520 U.S. at 271 (internal quotation marks and citation omitted). This is not, however, such a case. As discussed above, several cases had held that aliens outside the sovereign territory of the United States—specifically including aliens at Guantanamo—did not possess several constitutional rights. As a result, to establish that the law was really the opposite would require an especially high degree of factual particularity. Cf. *ibid.* ("[W]hen an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary.").

Finally, petitioners claim (Pet. 34-35) that respondents "knew * * * that torture violated U.S. criminal and military law" or that torture had been held "unconstitutional when it occurred in U.S. prisons." But those allegations of the complaint (which the government does not concede) are insufficient to show that the *constitutional* rights that *petitioners* assert were clearly established. As this Court has made clear, qualified immunity applies unless it is clearly established that the defendant's alleged actions violate the same right that provides the basis for the plaintiff's claim. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation."); *ibid.* ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon."); see also

Elder v. *Holloway*, 510 U.S. 510, 515 (1994) (to defeat immunity, "the clearly established right" must be "the federal right on which the claim for relief is based"). Here, petitioners base their claim on violations of the Fifth and Eighth Amendments as they apply to aliens in Guantanamo, and thus must show that *those* rights (not any other statutory or constitutional rights) were clearly established.[11]

Because petitioners cannot make that showing, respondents are entitled to qualified immunity even if the court of appeals erred in holding that petitioners lacked enforceable rights under the Fifth and Eighth Amendments.

c. Further review is also inappropriate because petitioners' constitutional claims should be barred for an independent reason. As respondents argued in the court of appeals (Gov't C.A. Br. 35-40) and as Judge Brown determined in her concurring opinion (Pet. App. 55a-58a), even assuming that the conditions of petitioners' detention at Guantanamo were governed by the Fifth and Eighth Amendments, special factors counsel against recognizing a *Bivens* remedy in this context. See *Wilkie*

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[11] Petitioners rely (Pet. 32) on the discussion in *Hope* of an Alabama Department of Corrections regulation. But *Hope* did not use one form of illegality to establish a different one. Instead, the Court found that the Eighth Amendment right not to be subjected to a certain punishment was clearly established by "Eleventh Circuit precedent" that addressed the Eighth Amendment question and a Department of Justice report that also addressed the constitutional question. 536 U.S. at 745-746. The prison regulation was discussed because it authorized the punishment in question only under conditions that were "analogous to the practice upheld" in the key Eleventh Circuit case, and because the violation of the regulation meant that the punishment had been implemented in a way that the Eleventh Circuit had previously "described as impermissible" under the Eighth Amendment. *Id.* at 744.

v. *Robbins*, 127 S. Ct. 2588, 2598 (2007) (noting that even if there is no alternative damages remedy available to a putative *Bivens* plaintiff, the courts must "pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation") (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). This Court has already suggested that such a limitation on *Bivens* remedies would be appropriate if the Fourth Amendment were held to govern actions that the military took against aliens abroad. See *Verdugo-Urquidez*, 494 U.S. at 273-274. And the District of Columbia Circuit has previously held that no damages remedy should be available "against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (1985).

3. The court of appeals' holding—based on District of Columbia tort law—that petitioners' claims under the ATS and the Geneva Conventions must be brought, if at all, against the United States under the FTCA (Pet. App. 15a-35a) does not warrant further review.

Under the Westfall Act, 28 U.S.C. 2679(b)(1), claims against federal employees for allegedly tortious acts done within the scope of their employment must proceed exclusively against the United States under the FTCA. See *United States* v. *Smith*, 499 U.S. 160, 163 (1991). The scope of employment is determined by reference to local *respondeat superior* law. *Haddon* v. *United States*, 68 F.3d 1420, 1422-1423 (D.C. Cir. 1995). Petitioners have not contested the lower courts' selection of the District of Columbia as the relevant locality here. Pet. App. 18a, 114a.

As in the court of appeals (see Pet. App. 20a-21a), petitioners challenge only one component of the scope-

of-employment test under District of Columbia law whether the acts in question are "incidental" to an employee's duties, and thus "of the kind [the employee] is employed to perform." Restatement (Second) of Agency § 228(1) (1958); see *Stokes* v. *Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003) (explaining that "District of Columbia law * * * looks to the Restatement (Second) of Agency (1958) in defining scope of employment").

Petitioners contend (Pet. 36) that "[t]orture is not incidental to military operations." They cite court of appeals cases holding that torture is illegal and criminal (both in this country and abroad), see *Nuru* v. *Gonzales*, 404 F.3d 1207, 1222-1223 (9th Cir. 2005); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980); *Khouzam* v. *Hogan*, 529 F. Supp. 2d 543, 552 (M.D. Pa. 2008), or that, in specific circumstances, acts of torture were not attributable to a foreign agency or instrumentality for purposes of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, see *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); *Zuncax* v. *Gramajo*, 886 F. Supp. 162, 175-176 & n.10 (D. Mass. 1995). Petitioners do not, however, account for the case law explaining what conduct is within the scope of employment.

Under the District of Columbia law of *respondeat superior*, the fact that an act is illegal or otherwise a crime does not necessarily mean that it is outside the scope of employment, because the focus of the inquiry is not "the nature of the tort," but whether the "underlying dispute or controversy" was "originally undertaken on the employer's behalf." *Council on Am. Islamic Relations* v. *Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting *Weinberg* v. *Johnson*, 518 A.2d 985, 992 (D.C.

1986)); see Pet. App. 23a, 25a-26a. In other words, "[c]onduct is 'incidental' to an employee's legitimate duties" if it is "a direct outgrowth of the employee's instructions or job assignment." *Haddon*, 68 F.3d at 1424 (citation omitted). Thus, as the court of appeals discussed (Pet. App. 23a-24a), cases applying the relevant standard under District of Columbia law have held that employees were acting within the scope of their employment when they defamed political opponents or raped and shot their customers, because the underlying disputes grew out of the employees' duties. See *Ballenger*, 444 F.3d at 664-665 (Congressman's allegedly defamatory statements held to be incidental to his office); *Lyon* v. *Carey*, 533 F.2d 649 (D.C. Cir. 1976) (deliveryman's assault and rape of customer held to be within scope of employment); *Johnson* v. *Weinberg*, 434 A.2d 404, 409 (D.C. 1981) (laundromat worker's shooting of customer held to be within scope of employment).

Here, petitioners cannot deny that the conduct they challenge grew out of a dispute related to respondents' official functions. Indeed, their complaint expressly alleged that respondents were motivated by a desire to serve their employer in the course of their job duties (*i.e.*, that they took action designed to elicit information about terrorism during interrogations).[12] Pet. App. 168a-169a, 208a; see *Ballenger*, 444 F.3d at 665 ("even a *partial* desire to serve the master is sufficient"). Respondents had specific responsibilities related to the

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[12] By the same token, any suggestion (Pet. 35) that the court of appeals erred in holding that petitioners' alleged mistreatment was "foreseeable" cannot be reconciled with their allegation that the mistreatment was the result of "deliberate and foreseeable action" rather than "isolated or rogue actions." Pet. App. 168a; see also Pet. 23-24.

custody and interrogation of detainees.[13] Pet. App. 174a-178a. Petitioners cite no case suggesting that those whose jobs include interrogation and custody act outside the scope of their employment when they mistreat a detainee during an interrogation (any more than a deliveryman acts outside the scope of employment under District of Columbia law by raping a customer). Moreover, petitioners' reliance (Pet. 36-37) on a Department of State report, which states in its discussion of the Uniform Code of Military Justice that torture is not within the "scope" of a commanding officer's position (Pet. App. 231a), is inapposite because it does not address the common law standard for determining the scope of employment in the relevant jurisdiction—here, the District of Columbia.

Finally, petitioners argue (Pet. 35-36) that the court of appeals' holding based on District of Columbia *respondeat superior* law effectively endorsed the "repellent proposition" that torture is an acceptable incident of interrogation. That reflects a misunderstanding of the Westfall Act. "Defining an employee's scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines *who* may be held liable for that conduct, an employee or his boss." *Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 265 (D.D.C. 2004), aff'd, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 547 U.S. 1069 (2006). The language of the Westfall Act covers claims alleging "wrongful" acts within the scope of employment, and makes no exception for acts that are not just wrongful

[13] One respondent allegedly provided a legal opinion purporting to justify mistreatment of detainees as part of her job as a Chief Legal Advisor. Pet. App. 178a-179a. Providing a legal opinion is exactly the "kind" of task a legal advisor is employed to perform.

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but also illegal or repellent. 28 U.S.C. 2679(b)(1). As one court observed in a related context, "if the scope of an official's authority or line of duty were viewed as co-extensive with the official's lawful conduct, then immunity would be available only where it is not needed." *Ramey* v. *Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (internal quotation marks and citation omitted). That is no less true when an employee claims immunity from suit under the Westfall Act because the plaintiff's sole recourse lies against the United States under the FTCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The Supreme Court of the United States

SHAFIQ RASUL, *et al.*,

Petitioners,

v.

RICHARD MYERS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF OF PETITIONER

Respondents' Opposition serves only to underscore the pressing need for the Court to grant certiorari in this case. In asserting that the Court of Appeals correctly held that detainees in custody have no right to be free from torture or to be free from abuse in the practice of their religion, the Opposition relies on certain critical propositions of law that are demonstrably wrong and require correction by this Court. Respondents' argument that petitioners are not "persons" improperly and exclusively focuses on one stated purpose of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, wholly ignoring a separate and broader stated purpose. And respondents' argument that petitioners have no rights under the Constitution not to be tortured reflects a refusal by government officers, yet again, to accept the holdings of this Court with respect to Guantánamo detainees, and specifically its ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that the "substantive guarantees of the *Fifth and Fourteenth Amendments*" apply to foreign nationals held at Guantánamo. *Id.* at 2246 (emphasis in original). Respondents suggest this case is not "the proper vehicle" (Opp'n 9) for addressing these issues, but petitioners respectfully submit that it is difficult to conceive of a case better suited to address the issue of whether Guantánamo detainees are "persons," and whether they have a Fifth Amendment right not to be tortured.

I. PETITIONERS' RFRA RIGHTS WERE CLEARLY ESTABLISHED AND RESPONDENTS' GROUNDLESS CLAIM OF QUALIFIED IMMUNITY IS NOT A REASON TO DENY CERTIORARI.

Respondents argue (Opp'n 10-15) that this Court, like the Court of Appeals, should read the RFRA statute with blinders on. According to respondents, RFRA has only one purpose, to "restore the compelling interest test" applicable to First Amendment free exercise cases prior to this Court's decision in *Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Yet RFRA itself announces two distinct purposes. One is certainly to restore the compelling interest test. The other, equally important, stated purpose is to provide a right of action to persons whose religious free exercise is substantially burdened by the government. Respondents next argue that aliens detained at Guantánamo are not "persons" within the meaning of RFRA because they do not enjoy an independent right of free exercise under the Constitution. Even if respondents' conclusion were true, there is nothing whatever in RFRA that so limits the plain meaning of the word "person." Lastly, respondents urge the Court to skip over the antecedent question whether petitioners have rights under the statute because respondents claim to be entitled to qualified immunity in any event. Under this Court's longstanding precedent, there is no basis for this proposed sequence, and even less for a finding of qualified immunity.

A. Respondents Violated RFRA.

RFRA is a straightforward statute which provides a cause of action to all "persons" burdened in the exercise of their religion without any limitations of geography, status or citizenship. The statute recites two separate and independent purposes: "The purposes of this chapter ***are***—(1) to restore the [pre-*Smith*] compelling interest test ...; ***and*** *(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.*" 42 U.S.C. § 2000bb(b) (emphasis added). Like the Court of Appeals, respondents read out of the statute the second stated purpose and then argue that the statute's purpose is "merely" to codify pre-*Smith* jurisprudence. That is not what the statute says.

RFRA precludes the federal government, each and every one of its officers, and any official of a "covered entity," 42 U.S.C. § 2000bb-2(2), from infringing on any "person['s]" exercise of religion unless the restriction is the "least restrictive means of furthering [a] compelling governmental interest." *Id.* § 2000bb-1(b)(2); S. Rep. 103-111, at 2, *as reprinted in* 1993 U.S.C.C.A.N. at 1893. RFRA also specifically creates a private cause of action against government officials who violate its terms. 42 U.S.C. § 2000bb-1(c).

In defining the term "covered entity" to include the "District of Columbia, the Commonwealth of Puerto Rico, and *each territory and possession* of the United States," *Id.* § 2000bb-2(2) (emphasis added), RFRA reaches the conduct of

federal officials that occurs not only within the continental United States, but also within its territories and possessions. *See, e.g., Guam v. Guerrero*, 290 F.3d 1210, 1221-22 (9th Cir. 2002) (applying RFRA to conduct in Guam). Military bases under long-term leases are U.S. "possessions." *Vermilya-Brown Co., Inc. v. Connell*, 335 U.S. 377, 389-90 (1948). It is well-established that RFRA applies to the military. *E.g., Veitch v. Danzig*, 135 F. Supp. 2d 32, 34-35 (D.D.C. 2001); *Rigdon v. Perry*, 962 F. Supp. 150, 160-61 (D.D.C. 1997). RFRA contains no restrictions suggesting that its protections are limited to persons living in the United States, or to citizens, or to any other defined group. This Court has long held that an unambiguous statute is to be applied according to its "ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). There is nothing arcane or confusing about the term "person." As the district court held and Judge Brown in her concurrence recognized, "Congress 'did not specifically intend to vest the term 'persons' with a definition ... at odds with its plain meaning.'" App. 59a (internal notations omitted). Respondents' entire argument is premised on such an obdurate misconstruction.

Moreover, if respondents (and the Court of Appeals) were correct that a cause of action under RFRA depends upon the plaintiff also having clearly established constitutional rights, RFRA's private cause of action would be unnecessary and entirely duplicative of a *Bivens* action. It is precisely because RFRA protects conduct and persons not protected by the First Amendment that its enactment was necessary.

It is indisputable that respondents' conduct constituted a clear violation of RFRA. The district court found that respondents' religious harassment, including "[f]lushing the Koran down the toilet and forcing Muslims to shave their beards[,] falls comfortably within the conduct prohibited from government action by RFRA." App. 93a-94a. In short, petitioners have rights under the plain language of RFRA, and respondents violated those rights.

B. The Court Should Resolve the Antecedent Question of Petitioners' RFRA Rights Before Turning to the Ancillary Question of Qualified Immunity.

Respondents argue (Opp'n 12) that this Court should not reach the question of whether petitioners have rights under RFRA, because those rights were not clearly established at the time of the conduct. Respondents' proposed sequence would leave in place the Court of Appeals' patently incorrect interpretation of RFRA and its pernicious conclusion that Guantánamo detainees are "non-persons," as well as turn this Court's immunity jurisprudence on its head. For this reason alone, certiorari should be granted.

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court mandated the proper analytic sequence, which is to consider first the "threshold question" of the existence of the right, and only when that is resolved, to proceed to the question of whether the

right was clearly established at the relevant time. *Id.* at 201. As the Court observed, "This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question of whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Id.* *See also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

Respondents suggest (Opp'n 17 n.8) that this Court may be reconsidering the analytic sequence mandated by *Saucier*. *See Pearson v. Callahan*, 128 S. Ct. 1702, 1702-03 (2008) (07-751; argued Oct. 14, 2008). But even if the Court decides in *Pearson* to relax the compulsory *Saucier* sequence, that sequence would still be appropriate here. The issue of detainees' religious rights continues to be relevant to hundreds of detainees and to the military officers responsible for their incarceration. As the United States observed in its amicus brief filed in *Pearson*, the sequence established in *Saucier*, "provide[s] useful clarification to future courts and to government officials." Brief for the United States as Amicus Curiae Supporting Petitioners at 24, *Pearson v. Callahan*, No. 07-751 (June 13, 2007). The instant case is precisely the type of case in which the existence of the right should be decided first. *Id.* at 25 (*Saucier* sequence should be retained in cases involving issues of "general application and recurring importance," in contrast to cases involving "factual nuances" or "totality-of-the-circumstances.")

The Court's concerns about the *Saucier* sequence, moreover, are not implicated in petitioner's RFRA claim. Petitioners' claim under RFRA requires this Court to engage only in statutory, not constitutional, construction. Thus, the Court's concern about avoiding, where possible, complicated issues of constitutional interpretation, which underlies its discomfort with the mandatory *Saucier* sequence, *see Brosseau v. Haugen*, 543 U.S. 194, 201-02 (Breyer, J., Scalia, J. and Ginsburg, J., concurring), is simply not at issue here.

C. Respondents Are Not Entitled to Qualified Immunity for RFRA Violations.

As the district court stated, "[t]o be absolutely clear, the plaintiffs are not alleging some novel statutory violation, one in which the defendants can reasonably claim qualified immunity." App. 97a. Respondents' suggestion that it was reasonable as a matter of law for federal officers to ignore the broad and unconditional language of RFRA which they were clearly violating, and unilaterally to imply non-existent exceptions and limits on its terms, is simply untenable.[1] It is never reasonable to ignore the plain terms of a statute.

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[1] The unreasonableness of respondents' position is highlighted by the fact that respondents' conduct also clearly violated Army Regulation 190-8, which requires military personnel to respect a prisoner's free exercise of religion. Army Reg. 190-8 1-5(g)(1); *id.* at 6-7(d)(1). Accordingly, there can be no question that respondents had fair warning that their conduct was illegal. *Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002).

Despite RFRA's unconditional language and the uniform prohibition of religious abuse of prisoners, respondents assert (Opp'n 16) that a reasonable officer could have "doubted" whether RFRA applied at Guantánamo. The logical contortions necessary to reach such a "doubt" fatally undermine respondents' argument that such "doubt" could be reasonable as a matter of law. In order to conclude that RFRA did not apply to their conduct, respondents would have had to: 1) ignore the plain language of RFRA, its legislative history and Supreme Court precedent; 2) ignore other regulations and laws prohibiting the same conduct; 3) read into RFRA a geographic exclusion of Guantánamo that appears nowhere in its text; 4) read into RFRA a restriction on standing, excluding aliens detained by the military, which also appears nowhere in the statute; and/or 5) presume the legality of outrageous offenses against the religious beliefs of detainees, which are anathema to the principles of religious liberty and tolerance on which this country was founded and the Constitution respondents are sworn to uphold. Respondents cannot rely on unstated exclusions to unambiguous statutory language to justify their egregious behavior. No qualified immunity protects their patently unreasonable conduct.

In trying to argue that their interpretation is reasonable, respondents resort (Opp'n 10) to the *reductio ad absurdum* that petitioners are somehow seeking to provide a cause of action to "any individual anywhere under any circumstances—an interpretation that would apply not just to Guantanamo detainees, but to any detainee held in

any detention facility during any war." This is a straw man. RFRA itself permits restrictions on religious practice as long as they are the least restrictive means necessary to achieve a compelling governmental purpose. Plainly, the protection, if any, to be accorded religious free exercise in an active war zone may be different from that which is permissible in a territory thousands of miles from a war zone, where the U.S. has *de facto* sovereignty and has been holding detainees without charge for years. *Rasul v. Bush* ("*Rasul I*"), 542 U.S. 466, 487 (2004) (Kennedy, J., concurring); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (plurality opinion) (recognizing difference between exigencies of battlefield and conditions of detention). In any event, there can be no doubt that U.S. officials should not direct that Korans be thrown in toilet buckets to humiliate detainees anywhere or anytime, and respondents could have been in no reasonable doubt that this was the case.

II. THE RIGHT NOT TO BE TORTURED IS PROTECTED BY THE FIFTH AMENDMENT, WHICH APPLIES AT GUANTÁNAMO.

Since detention began at Guantánamo in 2002, this Court has repeatedly affirmed that detainees possess cognizable rights under the laws of the United States and the Constitution. *Rasul I*, 542 U.S. at 483-84; *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene*, 128 S. Ct. at 2240. Yet the Government continues to press highly constricted interpretations of these holdings, often successfully in the lower courts, and now, nearly seven years

since the first detainees arrived at Guantánamo, some 250 men remain incarcerated and, in respondents' view, unprotected from torture. Respondents' opposition prefigures the same unfortunate dynamic occurring yet again. Despite this Court's clear statement that the "substantive guarantees of the *Fifth and Fourteenth Amendments,*" 128 S. Ct. at 2246 (emphasis in original), apply to foreign nationals, like petitioners, "who have the privilege of litigating in our courts," *id.*, respondents assert that the holding of *Boumediene* is limited to the Suspension Clause, stating:

> Thus, *Boumediene* did not overturn the Court's prior rulings that the individual-rights provisions of the Constitution run only to aliens who have a substantial connection to our country and not to enemy combatants who are detained abroad. In *Johnson v. Eisentrager*, for instance, this Court had addressed whether aliens outside the sovereign territory of the United States possess "substantive constitutional rights" in general and Fifth Amendment rights in particular, and it held that they did not. Later decisions reaffirmed that holding.... The court of appeals' decision remains correct following *Boumediene*.

(Opp'n 18-19 (internal citations omitted)) Thus, according to respondents, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which was a cornerstone of the

Court of Appeals' decision below, still governs Guantánamo notwithstanding the Court's more recent decisions in *Rasul I* and *Hamdan*; *Boumediene* applies only to the Suspension Clause and provides no support for the existence of any other right; and detainees seeking recognition of other rights, including the right not to be tortured, are left with the Sisyphean task of vindicating their rights, one iteration at a time. With respect, the Solicitor General's construction of *Boumediene* is insupportable. The right not to be tortured is fundamental. *Brown v. Mississippi*, 297 U.S. 278, 285-87 (1932). Certiorari is necessary to provide clear affirmation that the "substantive guarantees of the *Fifth and Fourteenth Amendments*," 128 S. Ct. at 2246 (emphasis in original), which must include at a minimum the right not be tortured, are available to Guantánamo detainees.

In the alternative, petitioners invite the Court to consider a remand of the instant case to the Court of Appeals for further consideration in light of this Court's *Boumediene* decision. The Court of Appeals relied extensively on its own decision in *Boumediene*, which has now been reversed. The Petition and Opposition make clear that the parties have a substantial dispute concerning the implications of this Court's ruling in *Boumediene*. Petitioners submit that respondents' construction is wholly untenable, but, in any event, under these circumstances, the Court may wish to grant the petition for certiorari, vacate the decision below, and remand the case to the Court of Appeals for further consideration. *E.g.*, *Youngblood v. West Virginia*, 547 U.S. 867 (2006); *Stutson v. United States*, 516

U.S. 193 (1996). What the Court should not do is leave in place a decision that places no limit on the ability of U.S. officials to torture based on the Court of Appeals' now-overruled opinion in *Boumediene*.

III. RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO THE *BIVENS* CLAIMS.

Respondents rely (Opp'n 20) on *Wilson v. Layne*, 526 U.S. 603, 618 (1999), in support of their qualified immunity argument, stating that "if judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." In the context of the instant case, this argument is truly reprehensible. Respondents were not seeking to comply with their constitutional obligations; they were seeking to evade them by creating a legal black hole at Guantánamo where they could torture and abuse with impunity. This is not simply "picking the losing side"; respondents actively sought a premise that, in their view, allowed them to violate the law. Respondents' deliberate choice to engage in a geographic gamble is not the type of conduct that the doctrine of qualified immunity was created to protect. Qualified immunity protects officers who make a good faith but incorrect attempt to comply with the law, not those who try without success to create an enclave where compliance with law is unnecessary.

IV. CONCLUSION

This case calls out for this Court to draw a clear legal line for all U.S. officials against torturing detainees and humiliating them in the practice of their religion. Respondents' opposition makes clear that the captors of these detainees *still* do not believe that this Court's precedents prevent them from torturing detainees and that they *still* do not believe that detainees are "persons" entitled to practice their religion without abuse. If the decision below is left in place, these abhorrent and dishonorable practices can continue under a shield of legality. This Court can and should accept certiorari to reverse the Court of Appeals' decision that petitioners are non-persons lacking basic human rights.

Respectfully submitted,

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In the
Supreme Court of the United States

SHAFIQ RASUL, ET AL.,
Petitioners,
v.
RICHARD MYERS, AIR FORCE GENERAL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AND MILITARY LAW AND HISTORY SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONERS*

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INTEREST OF AMICI[1]

Amici are retired military officers, scholars of military law and history, and a nonprofit organization dedicated to advancing the fair administration of military justice. They have an interest in the maintenance of our Nation's military tradition of humane treatment of detainees captured in armed conflict and strict enforcement of military, domestic and international law requiring such treatment.

Commander (Ret.) David Glazier served twenty-one years as a United States Navy surface warfare officer and is now an Associate Professor of Law at Loyola Law School Los Angeles, where he teaches the law of war.

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[1] Pursuant to Supreme Court Rule 37.2(a), amici curiae certify that counsel of record of all parties received timely notice of the intent to file this brief in accordance with this Rule and they have consented to the filing of this brief. Letters of consent by counsel of record for the parties have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, amici also certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to its preparation or submission.

Jonathan Lurie, Professor of History and Adjunct Professor of Law at Rutgers University, teaches legal history and military legal history.

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The National Institute of Military Justice ("NIMJ") is a nonprofit corporation organized to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty, but nearly all of whom have served as military lawyers, several as flag and general officers.

SUMMARY OF ARGUMENT

Amici submit this brief in support of the petition for certiorari, insofar as it asks this Court to review the D.C. Circuit's decision affirming that United States civilian and military officials alleged to have ordered, authorized or condoned torture or inhumane treatment of detainees interrogated by their subordinates are entitled to immunity under the Westfall Act, because these officials were acting within the "scope of [their] employment" and to qualified immunity because it was not established at the time that the victims of these practices, detainees at Guantanamo, had recourse to a suit under the Constitution.

Review by this Court is appropriate because these aspects of the D.C. Circuit's decision threaten

to undermine long-standing principles of military law and tradition absolutely forbidding torture and inhumane treatment of detainees and the doctrine of command responsibility. Under that doctrine, military officials and their civilian superiors are under a duty to train their subordinates to refrain from torture or inhumane treatment and prevent it if within their power to do so and are held legally accountable if they fail to do so. Review by this Court is needed to clarify that officials who, instead, authorize or condone such conduct are not acting within their "scope of employment" and hence are not entitled to Westfall Act immunity.

Similarly, review by this Court is needed to clarify that qualified immunity is unavailable to officials who authorize or condone torture and inhumane treatment in blatant violation of their duties to their troops and military and civilian law even if, at the time, it had not yet been established that the victims of those unlawful practices had a right to sue under the Constitution. The doctrine of qualified immunity should not be available to shelter conduct so plainly unlawful and that military law and policy emphatically reject.

ARGUMENT

I. REVIEW BY THIS COURT IS NEEDED TO ESTABLISH THAT IMMUNITY IS UNAVAILABLE TO OFFICIALS WHO VIOLATE THEIR DUTIES AS MILITARY COMMANDERS BY AUTHORIZING OR CONDONING TORTURE AND INHUMANE TREATMENT

A significant feature of this case, making it especially appropriate for review, is its potential impact on our military forces and their standing in the world. The absolute prohibition of torture and inhumane treatment, in particular under military law and tradition, and the responsibility of those in command to prevent it are essential to the discipline of our military, their reputation, their protection from criminal liability, and their safety should they fall into enemy hands.

Furthermore, while Amici focus on the impact such derelictions of duty have on our military, the impact on victims of such abuses should not be overlooked. A significant purpose of the doctrine of command responsibility is to incentivize those in command to protect persons in custody from mistreatment by holding them accountable if they fail to do everything in their power to prevent such mistreatment by their subordinates. Where those in command instead authorize or condone such mistreatment, immunizing them from monetary liability to the victims diminishes that incentive and undermines a central tenet of military law and policy.

Review by this Court is needed to determine whether immunity is warranted in view of the damage officials who authorize or condone such abuses by their subordinates inflict on victims, our military, and our Nation.

A. Torture and Inhumane Treatment Have Long Been Forbidden by Military Law and Policy and the Law of War

1. Humane Treatment of Detainees Has Been a Cornerstone of United States Military Doctrine Since the Nation's Founding.

Since the Revolutionary War, the United States military has maintained a tradition of treating captured combatants humanely. This tradition began with George Washington, who, after the Battle of Trenton, ordered his troops to treat hundreds of surrendering Hessian soldiers "with humanity," and to "[l]et them have no reason to complain of our copying the brutal example of the British army." David Hackett Fischer, *Washington's Crossing*, 377-79 (2004).

This tradition was codified during the Civil War, when President Lincoln signed General Orders No. 100, also known as the Lieber Code. Francis Lieber, *Instructions for the Gov't of Armies of the United States in the Field*, U.S. War Dep't Gen. Orders No. 100 (April 24, 1863). The Lieber Code forbade the "intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity" upon a prisoner of war, *id.* at § III, art. 56, and specified that

while prisoners of war may be confined "such as may be deemed necessary on account of safety," they "are to be subjected to no other intentional suffering or indignity" and "treated with humanity." *Id.* at art. 75-76. The Code expressly forbade using violence to interrogate enemy captives. *Id.* at § I, art.16 ("Military necessity does not admit of cruelty . . . nor of torture to extort confessions.").

The Lieber Code has greatly influenced United States. military tradition and the law of war. During the 19th century, the Code served as the foundation for instruction on the law of war at the United States Military Academy. *See* Col. Patrick Finnegan, *The Study of Law as a Foundation of Leadership and Command: The History of Law Instruction at the United States Military Academy at West Point*, 181 Mil. L. Rev. 112, 114 (2004).

It also formed "the basis of every convention and revision" of international law concerning the treatment of prisoners of war, including the Hague Conventions of 1899 and 1907, the first multilateral codification of the modern law of war. Brig. Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L.Q. 40, 42 (1950). The brutality of the First World War prompted the United States and more than forty other countries to enter into the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. After the Second World War, the laws of war were revisited, resulting in the adoption in 1949 of the four Geneva Conventions.[2]

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[2] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the

The United States military has long trained its officers to observe the laws of war and the standards of the Hague and Geneva conventions. *See generally* Finnegan, 181 Mil. L. Rev. 112; U.S. Dep't of the Army, Field Manual 27-10, *The Laws of Land Warfare* (July 1956) ("FM 27-10"). The four Geneva Conventions of 1949 provide comprehensive standards for the treatment of persons detained in armed conflicts. The Geneva Convention Relative to the Treatment of Prisoners of War ("GPW" or "Third Convention") addresses the treatment of prisoners of war. Common Article 3 – so denominated because it is common to all four Geneva Conventions – addresses the treatment of persons detained in armed conflicts that do not involve conflicts between nations, such as civil wars. Common Article 3 prohibits "violence to life and person . . . mutilation, cruel treatment and torture; . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment" against *all* detainees. *See, e.g.*, GPW, Art. 3.

Article 75 of Protocol I to the Geneva Conventions prohibits torture, "violence to the life, health, or physical or mental well-being," and

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Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (collectively, the "1949 Geneva Conventions"). All four conventions were ratified by the United States in 1955. *See* 101 Cong. Rec. 9,958-73 (1955).

"outrages upon personal dignity, in particular humiliating and degrading treatment" of any detainees. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Prot. of Victims of Int'l Armed Conflicts, Art. 75 at ¶ 2, June 8, 1977, 1125 U.N. 3, ("Protocol I"). The United States has not adopted Protocol I, but "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003).[3]

The United States military has maintained its commitment to provide humane treatment to detainees, even if detainees do not qualify for treatment as "prisoners of war" under the Third Convention. During the Vietnam War, the United States extended the Convention's prisoner of war protections to all captives – including Viet-Cong, who did not follow the laws of war. *See* United States Military Assistance Command for Vietnam, Annex A of Directive No. 381-46 (Dec. 27, 1967), *reprinted in* Charles I. Bevans, ed., *Contemporary Practice of the United States Relating to Int'l Law*, 62 Am. J. Int'l L. 754, 766-67 (1968).[1]

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[3] Mr. Taft was Legal Adviser to the Department of State from 2001 to 2005.

[1] During the Korean War, the United States adhered to the Third Convention even though it had not yet ratified it. *See* Maj. James F. Gebhardt, *The Road to Abu Ghraib: U.S. Army Detainee Doctrine and Experience*, Military Review, Jan.-Feb. 2005, at 2, 15.

During the 1970s the United States Army adopted the "implementation of the Geneva Conventions" as the main objective of enemy prisoner of war operations in place of the "acquisition of maximum intelligence information." *See* Gebhardt, *The Road to Abu Ghraib*, at 44, 50.

2. The Uniform Code of Military Justice and the Military's own Regulations Forbid the Mistreatment of Detainees

The conduct of military personnel is governed by the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 101, *et seq.*, and Field Manuals issued by the Armed Forces. The UCMJ and the Field Manuals have consistently prohibited the mistreatment of detainees.

The UCMJ prohibits a member of the military from committing acts of "cruelty toward, or oppression or maltreatment of any person subject to his orders." 10 U.S.C. § 893. Actual and attempted murder, manslaughter, rape, maiming and assault are punishable under the UCMJ. 10 U.S.C. §§ 880, 918-920, 924, 928. Extorting or threatening a detainee for information is also prohibited., 10 U.S.C. §§ 927, 934.

FM 27-10 contains the Army's interpretation of the law of war, which incorporates international conventions – including the 1949 Geneva Conventions – and the customary law of war. Importantly, FM 27-10 incorporates Common Article 3. *See* FM 27-10, Art. 11; *see also id.* at Arts. 246, 248, 271, 446.

Army Field Manual 34-52, *Intelligence Interrogation* (May 1987) ("FM 34-52")[5], which set forth the United States Army's official position on acceptable interrogation techniques and prohibited conduct at the time of the acts alleged by Petitioners, provides that interrogators must operate "within the constraints" established by the UCMJ and the Geneva Conventions. FM 34-52, *preface* at iv. FM 34-52 emphasizes that the Geneva Conventions and United States policy "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id.* at 1-8; *see also id.* at 1-12 (threats constitute coercion).[6]

FM 34-52 also emphasizes the doctrine of command responsibility: commanders must act to insure that their subordinates abide by the Geneva Conventions and are personally accountable for their subordinates' violations. FM 34-52 specifies that the Geneva Conventions impose an "affirmative duty upon commanders to insure their subordinates are

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[5] On September 6, 2006, FM 34-52 was replaced with Field Manual 2-22.3, *Human Intelligence Collector Operations* (Sept. 2006) ("FM 2-22.3"). This manual contains the same prohibitions on torture and mistreatment of detainees as FM 34-52 and re-emphasizes the military's commitment to the Geneva Conventions and in particular to Common Article 3. *See, e.g.*, FM 2-22.3 at 5-26.

[6] The manual includes as examples of physical and mental torture: infliction of pain through chemicals or bondage; forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time; any form of beating; mock executions; and abnormal sleep deprivation. *Id.* at 1-8; *see also id.* at D-1 – 2.

not mistreating protected persons or their property. The command and the government will ultimately be held responsible for any mistreatment." FM 34-52, D-1. These principles apply regardless of whether a detainee is an enemy prisoner of war, a captured insurgent, or a civilian detainee. *Id.* at 1-7. Army personnel know that "improper" or "unlawful" interrogation techniques may harm critical intelligence gathering efforts and "send U.S. soldiers to prison." *Id.* at C-4.

Against this background, the Offices of the Judge Advocate General for the Navy, Army and Air Force in 2003 expressed concern over the suggested authorization of aggressive interrogation techniques in a draft report for Secretary Rumsfeld. Brigadier General Kevin M. Sandkuhler, United States Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, warned that authorizing aggressive interrogation techniques would have a number of adverse affects, including "Criminal *and Civil Liability* of DOD Military and Civilian Personnel in Domestic, Foreign, and International Forums." Memorandum from Brig. Gen. Kevin M. Sandkuhler, U.S. Marine Corps, Staff Judge Advocate to the Commandant of the Marine Corps, to Gen. Counsel of the Air Force (Feb. 27, 2003) *reprinted in* 151 Cong. Rec. S8794 (emphasis added). Similarly, Major General Jack L. Rives, Deputy Judge Advocate General of the United States Air Force, suggested that the report contain the following:

> U.S. Armed Forces are continuously trained to take the legal and moral 'high-road' in the conduct of our military

> operations regardless of how others may operate. While the detainees' status as unlawful belligerents may not entitle them to protections of the Geneva Conventions, that is a legal distinction that may be lost on the members of the armed forces. *Approving exceptional interrogation techniques may be seen as giving official approval and legal sanction to the application of interrogation techniques that U.S. Armed Forces have heretofore been trained are unlawful.*

Memorandum from Major Gen. Jack L. Rives, Deputy Judge Advocate Gen. of the U.S. Air Force, to SAF/GC (Feb. 6, 2003) *reprinted in* 151 Cong. Rec. S8794-95 (emphasis added).

Likewise, Major General Thomas J. Romig, United States Army, Judge Advocate General, noted that some of the "aggressive counter-resistance interrogation techniques" being considered by the Department of Defense failed to "comport with Army doctrine as set forth in Field Manual (FM) 34-52 Intelligence Interrogation."[7]

In July 2004, Alberto Mora, then General Counsel to the Navy, criticized the interrogation

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[7] Memorandum from Major Gen. Thomas J. Romig, U.S. Army, Judge Advocate Gen., to Gen. Counsel of the Air Force (Mar. 3, 2003), *reprinted in* 151 Cong. Rec. S8794

techniques authorized by Secretary Rumsfeld in his December 2, 2002 memorandum,[8] stating:

> [These techniques] should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture . . . . Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute 'cruel, inhuman, or degrading treatment, another class of unlawful treatment.

See Memorandum from Alberto J. Mora to Inspector Gen., U.S. Dep't of the Navy at 6 (July 7, 2004).[9]

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In addition to the military law and policy discussed above, Petitioners describe civilian law prohibitions on torture and cruel, inhuman and degrading treatment under the U.N. Convention Against Torture and the prohibition of torture under customary international law and United States

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[8] Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Def., to Donald Rumsfeld, Sec'y of Def. (Nov. 27, 2002) (approved by Sec'y Rumsfeld on Dec. 2 2002), available at http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf, last visited Sept. 21, 2008.

[9] The memorandum is available at http://www.newyorker.com/images/pdfs/moramemo.pdf, last visited Sept. 21, 2008. *See also* Jane Mayer, The Dark Side at 213-37 (2008).

criminal law. (Pet. at 27-30.) Amici, however, emphasize the centrality of the 200-year tradition of military law and policy to prohibit torture and inhumane treatment, the duty of those in command to do all in their power to prevent such practices by their subordinates, and the principle that they will be held legally accountable if they fail to do so. For as we show in the next section, the D.C. Circuit's decision affirming immunity for officials claimed to have authorized or condoned such practices is totally at odds with those military doctrines.

B. Law, Military Policy and the Welfare of Our Armed Forces Require That Officials Authorizing or Condoning Torture or Inhumane Treatment Be Held Accountable, Not Immune

The D.C. Circuit's holding that Respondents are entitled to Westfall Act and qualified immunity conflicts with the principle that those in command of our armed forces have a duty to train their subordinates to refrain from torture and inhumane treatment and must accept responsibility for their failure to prevent such conduct where it is in their power to do so. Here it is alleged that respondents not only violated that duty but authorized or condoned such illegal conduct.

Review by this Court is needed to establish that whatever immunities are appropriate in other contexts, high civilian and military officials should be accountable, not immune, if they authorize or condone torture or inhumane treatment. This principle is essential to the discipline, safety and reputation of our armed forces.

1. Officials Who Authorize or Condone Torture or Inhumane Treatment Violate Their Duties as Military Commanders and Therefore Are Not Acting Within Their "Scope of Employment" As Required for Westfall Act Immunity

Under United States military law and the law of war, those in command are legally responsible for the unlawful conduct of their subordinates, if they direct it, fail to take measures within their power to prevent it, or fail to investigate and punish violations which they are or should be aware.[10] This doctrine of command responsibility has been recognized in international law at least since a proclamation of Charles VII of France in 1439,[11] and is embedded in the law of war[12] and United States military regulations.

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[10] *See, e.g., Estate of Ford* v. *Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002); Protocol I, *supra*, art. 86(2).

[11] *See* L.C. Green, *Command Responsibility in Int'l Humanitarian Law*, 5 Transnat'l L. & Contemp. Probs. 319, 320-21 (1995).

[12] *See, e.g.*, Protocol I of the Geneva Conventions of 1949, *supra*, art. 86(2); Rome Statute of the Int'l Criminal Court, art. 28, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3; Statute of the Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 7, May 25, 1993, U.N. Doc. S/25704; Statute of the Int'l Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of Int'l Humanitarian Law Committed in the Territory of

The doctrine was recognized by this Court in *In re Yamashita*, 327 U.S. 1 (1946), which held that General Yamashita, the commander of Japanese forces in the Philippines, was properly charged under the law of war for atrocities committed by troops under his command. *Id.* at 17. Yamashita argued that he could not be tried by military commission because he had not been charged with a violation of the law of war, as required by the statute authorizing the commission. *Id.* at 14. This Court disagreed, finding that the charge that he failed to take measures to prevent atrocities committed by forces under his command satisfied the statute, because "the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war. . . ." *Id.* at 14-15. *See also, e.g.*, *Estate of Ford* v. *Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002); *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 776-78 (9th Cir. 1996); *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 171-73 (D. Mass. 1995).

Most importantly, this doctrine is embraced by United States Army regulations and field manuals. A soldier who exercises command authority in the United States military "[is] responsible for everything [his or her] command does or fails to do." U.S. Dep't of Army, Army Regulation 600-20, *Army Command Policy*, §2-1b (June 2006). A commander

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Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighboring States Between Jan. 1, 1994 and Dec. 31, 1994, art. 6, Nov. 8, 1994, 33 I.L.M. 1598.

assumes "the legal and ethical obligation . . . for the actions, accomplishments, or failures of a unit." U.S. Dep't of Army, Field Manual 101-5, *Staff Org. and Operations*, 1-1 (May 1997) ("FM 101-5"). As a matter of official military policy, the "ultimate authority, responsibility, and accountability" for the acts of subordinates "rest wholly with the commander." *Id.* at 1-2.[13]

Command responsibility is recognized as fundamental to military discipline and effectiveness. It provides incentives for commanders to control their subordinates and for subordinates to follow the orders of commanders who they know are accountable for them. *See* U.S. Dep't of Army, Field Manual 22-100, *Military Leadership*, §§ 3-22 – 3-23 (Aug. 1999) ("FM 22-100")[14]; Cmdr. Roger D. Scott, *Kimmel, Short, McVay: Cases Studies in Executive Authority, Law and the Individual Rights of Military Commanders*, 156 Mil. L. Rev. 52, 169-170 (1998) ("command responsibility is the bedrock upon which all military discipline rests") (quoting Sen. Malcolm Wallop (R-WY)); *Prosecutor* v. *Delali, et al.*, Case No. IT-96-21-T, Judgment, ¶ 647 (Nov. 16, 1998) ("The doctrine of command responsibility is . . . a species of

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[13] Command responsibility does not absolve subordinates from liability for obeying manifestly illegal orders. Subordinates who comply with such orders remain responsible for their actions.

[14] In October 2006, the U.S. Army replaced FM 22-100 with Field Manual 6-22, *Army Leadership* (Oct. 2006) ("FM 6-22"), which reaffirms the same doctrines of command responsibility as FM 22-100. *See* FM 6-22 §§ 2-10 – 2-12, 4-16, 6-22.

vicarious responsibility through which military discipline is regulated and ensured.").

Moreover, for the United States military, command responsibility is more than an effective way to promote discipline; it is an essential moral value:

> The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority. Nowhere else does a boss have to answer for how subordinates live and what they do after work. Our society and the institution look to commanders to make sure the missions succeed, that people receive proper training and care, that values survive.

FM 22-100, §1-61.

It is integral to United States military tradition that before a military commander is considered fit to exercise this sacred trust, he or she must internalize, accept and *embody* certain core values, including loyalty, duty, respect, and integrity. *See id.* at §§1-1 – 1-4, 2-4 – 2-39. Pursuant to these values, a leader "take[s] full responsibility for [his] actions and those of [his] subordinates." *Id.* at §2-14.

The doctrine of command responsibility is completely inconsistent with the D.C. Circuit's holding that the violations of Respondents' duties alleged here came within their "scope of employment", entitling them to Westfall Act immunity.

law and policy are specifically designed to discourage such conduct and there is therefore no reason to shelter it from the threat of litigation that might "chill" such illegal conduct.

This Court has not had any prior opportunity to consider the applicability of qualified immunity to conduct so inimical to our armed forces. We urge the Court to accept review to make it clear that our law discourages such conduct and offers no solicitude for officials who engage in it to the great detriment of our military and our Nation.

CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to grant the petition for certiorari, insofar as it relates to the issues of immunity.

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Respectfully submitted,
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